124-139

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 206.

KELLEY AND ALEXANDER, PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED FEBRUARY 23, 1885.

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U. S. vs. Louisiana

182 — 192 (P) missing

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court before you between Kelley and Alexander, plaintiffs, and The Mayor and Aldermen of the Town of Milan, defendant, a manifest error hath happened, to the great damage of the said Kelley and Alexander, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 187–, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Jackson, this 10 day of December, A. D. 1884, and 109 of American Independence.

BELL W. ETHERIDGE, *Clerk.*

[Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. Writ of error. Kelly and Alexander *vs.* Mayor and Aldermen of Town of Milan. Issued this 10 day of Dec., A. D. 1884. Bell W. Etheridge, clerk; W. B. Weisiger, D. C.

2 Supreme Court of the United States.

Know all men by these presents that we, Kelley and Alexander and Holmes Cummins, their surety, are held and firmly bound unto the Mayor and Aldermen of the Town of Milan in the sum of two hundred and fifty dollars, to be paid to the said Mayor and Aldermen of the Town of Milan, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 10 day of December, 1884.

Whereas the above-named Kelley and Alexander hath prosecuted a writ of error appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern division of the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Kelley and Alexander shall prosecute their said writ of error appeal to effect and answer all costs if they shall fail

to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

KELLEY & ALEXANDER, [SEAL.]
By their attorney, HOLMES CUMMINS. [SEAL.]
HOLMES CUMMINS. [SEAL.]

Acknowledged before me this 10 day of Dec'r, 1884.
BELL W. ETHERIDGE, *Clerk.*

Approved:
E. S. HAMMOND,
Judge, &c.

[Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. Kelly and Alexander *v.* Mayor and Aldermen of the Town of Milan. Appeal bond. Writ of error bond. To United States Supreme Court. Filed the 10 day of Dec'r, A. D. 1884. Bell W. Etheridge, clerk; W. B. Weisiger, D. C.

3 Everett Bell is hereby appointed special deputy U. S. marshal, district of West Tennessee, to execute and return the within process.

Given under my hand and seal this 31st day of December, 1884.
M. T. WILLIAMSON, [SEAL.]
U. S. Marshal.

United States of America to the Mayor and Aldermen of the Town of Milan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1885, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein Kelley and Alexander are plaintiff- and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 10 day of December, 1884.

E. S. HAMMOND, *Judge.*

[Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. Kelly and Alexander *vs.* Mayor and Aldermen of the Town of Milan. Citation. Filed the 10th day of Dec'r, A. D. 1884. Bell W. Etheridge, clerk; W. B. Weisiger, D. C.

At Memphis, Tenn., on this 31st day of December, 1884, I served the within by handing a true copy hereof to George Gantt, Esq., of Gantt & Patterson, attorneys of record for defendant corporation.

$2.06. M. T. WILLIAMSON,
U. S. Marshal,
By W. H. NEAL, *Deputy.*

At Trenton, Tenn., on this 5th day of January, 1885, I executed the within by handing a true copy hereof to S. B. Williamson, Esq., of Hill & Williamson, attorneys of record for defendant corporation.
$2.06. M. T. WILLIAMSON,
U. S. Marshal,
By EVERETT BELL,
Sp'l Deputy.

4 *Bill of Exceptions.*

In Circuit Court of the United States for the Eastern Division of the Western District of Tennessee.

KELLY AND ALEXANDER
vs.
MAYOR AND ALDERMEN OF MILAN. } No. 20.

5 In this cause the parties filed stipulations as to the facts, reserving, however, all questions as to the competency and relevancy of the proof in its applications to the issues made by the pleadings, which stipulations is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, at Jackson, Tenn., for the Eastern Division of West Tennessee.

KELLY AND ALEXANDER
vs.
THE MAYOR AND ALDERMEN OF MILAN.

In this cause it is agreed between the parties that the statements herein are true, and the same may be used and relied on by
6 either or both parties as evidence on any hearing or trial of this cause or on any motion for a new trial; same being the facts connected with matters in controversy, viz:

First. That the coupons sued on were issued with and represent interest upon bonds issued by defendant in payment of a stock subscription made by defendant on the — day of ——, 187–, to the Mississippi Central Railroad Company. Said subscription was for the sum of $12,000, and in payment thereof (12) twelve bonds, each for the sum of $1,000, were issued, bearing date the — day of ——, 187–, and payable 20 years thereafter, with said coupons and others of like amounts thereto attached, representing the interest on said bonds.

Second. That at the time of making such subscription said
7 railroad company was about to extend its line from Jackson, Tenn., to Cairo, Ill., and said subscription was to aid in making such extension and to secure its location through defendant's town.

Third. That said railroad extension was completed on the — day of ——, 1873, the same running through defendant's town limits, as it stipulated for; and the same has been operated ever since that date.

Fourth. The following is a copy of one of said bonds, the others being the same, except as to numbers:

No. 1. STATE OF TENNESSEE, *Town of Milan.* $1,000.

Be it known that the Town of Milan, by its mayor and aldermen, in consideration of the location of the Mississippi Central
8 railroad by said town, the citizens thereof, in pursuance of the laws of Tennessee authorizing the same, having agreed to issue bonds, payable on twenty years' time, to the amount of twelve thousand dollars, with annual interest at seven per cent., with coupons attached in bonds of one thousand dollars each;

And whereas the people of Milan voted the same by a majority and in the form required by law, the vote being in pursuance of due notice and in all respects according to the laws of Tennessee, said bonds to be payable to the Mississippi Central railroad, under lease and control of the Southern Railroad Association:

Now, be it known that the Town of Milan, by its mayor and aldermen, in pursuance of the authority given by the people
9 thereof, and in obedience to the duty required of them, issues and delivers this bond, being one of twelve; and said Town of Milan hereby acknowledges itself to owe and be indebted to —— —— or bearer in the sum of one thousand dollars, which sum said Town of Milan binds itself to pay in lawful money of the United States to the Mississippi Central Railroad Company or to the order of the Southern Railroad Association or bearer, in the city of New York, or or before the first day of July, in the year of our Lord one thousand eight hundred and ninety-three, with interest at the rate of seven per cent. per annum, payable annually on the first day of July of each year, on presentation of the proper coupons, hereto annexed.

And the Town of Milan, by its mayor and aldermen, hereby
10 pledges the legal responsibility and the faith of said town for the payment of said coupons and bond according to the terms and effect hereof.

In testimony whereof, the Mayor and Aldermen of the Town of Milan have caused the signature of the mayor to be hereto set and the seal of the corporation to be affixed this first day of July, 1873, A. D.

[L. S.] A. JORDAN,
Mayor of the Town of Milan.

Fifth. That on or about the 10th day of July, 1874, said A. Jordan and others, residents and tax-payers of said town of Milan, instituted proceedings in one of the courts of chancery at said State, to wit, in the chancery court of Humboldt, in Gibson county,
11 for the purpose of avoiding the liability of said town upon said bonds, the said railroad company and others being made defendants thereto.

The following is a full and true copy of said proceedings and of the decree, the same being final, rendered by said chancery court

thereon. Said decree was not appealed from and still remains in full force, viz:

The Bill.

To the Hon. John Somers, chancellor, holding the chancery court at Humboldt, Gibson county, Tenn.:

Complainants A. Jordan, W. J. House, J. G. Boyd, M. L. Baird, Wilson G. Williamson, S. F. Rankin, and J. H. Dickinson show to your honor that they are citizens and residents of the town of Milan, in the 13th civil district of said county; that said town of
12 Milan is by law an incorporated town or city, and complainants reside within the corporate limits and are tax-payers within said corporation; and the said Jordan is the legally elected and qualified and acting mayor of the said town, and the other complainants are the aldermen of the said town, duly elected and qualified, and together constitute the board of mayor and aldermen in and for said town or city.

Complainants further show that they were duly qualified and entered upon the discharge of their duties as mayor and aldermen of said town on the 12th of January, 1874, and their term of office continueing for one year from the date of qualification.

Complainants further show that, upon inspection and exam-
13 ination of the minutes and record of proceedings of their predecessors in office, they find the following entry, of date May the 11th, 1872: "The board was convened by order of the mayor. Present: A. Jordan, mayor; W. M. McCall, M. B. Harris, J. H. Dickinson, J. M. Douglas, W. E. Reeves, W. H. Algea, aldermen.

On motion, it was ordered that 12 bonds, of $1,000 each, with coupons attached, payable 20 years after issuance, bearing interest at 7 per cent. per annum, be issued by the corporation of the town of Milan, Tenn., to the Mississippi Central Railroad Company upon the following conditions, namely: That the Mississippi Central Railroad Company be extended from Jackson, Tenn., to the town of Milan and intersect or cross the Memphis and Louisville railroad at the point agreed upon by Col. Read, chief engineer of the
14 Mississippi Central railroad, and the committee on behalf of the corporate authorities of the town of Milan, near S. P. Clark's residence, the interest on said bonds to be paid annually; and that the town marshal open and hold an election on the 12th day of June, 1872, within the corporate limits of said town, for a ratification or rejection of said proposition." And on the 17th day of June, 1872, said board again met, when the following proceedings were had, as appears from the said minutes:

The board met pursuant to adjournment. Present: A. Jordan, mayor; W. M. McCall, M. B. Harris, J. M. Douglas, W. H. Algea, and W. E. Reeves, aldermen.

The minutes of the former meeting were then read and adopted.

The election was held on the 12th day of June, 1872, for the ratification or rejection of the action of the board of
15 mayor and aldermen of the town of Milan in regard to the issuance of the $12,000 in bonds to the Mississippi Central

Railroad Company upon certain conditions. The returns of said elections show a vote of 117 for subscription and 2 no subscription;" and at the same meeting appears the following entry: "W. M. McCall and W. H. Algea were appointed a committee to correspond with Judge Milton Brown, of Jackson, Tenn., in regard to the proposition of Milan corporation in regard to issuing the $12,000 in bonds to the Mississippi Central Railroad Company."

Complainants show that the foregoing entries, all of which appear upon the minutes of said board of mayor and aldermen, constitute all the proceedings in regard to the subscription of said $12,000 in bonds and in regard to the election held for
16 ratification or rejection of their action in directing the issuance of said bonds.

Complainants charge that there is nothing to show the manner in which said election was held or by whom the returns thereof were made, nor is there anything to show that the required number of votes were polled in favor of said proposition, as by law required.

Complainants further charge that the order or ordinance of said board directing the issuance of said bonds was wholly without authority, illegal, and void: First, because, as they charge, that said ordinance was adopted and said election ordered without any previous, contemporaneous, or subsequent application in writing or otherwise to said board for said purpose by commissioners ap-
17 pointed to open subscription books for stock to said board or by the board of directors themselves or by any one else authorized so to do, as required by sec. 1144 of the code of Tennessee; and secondly, because said election was ordered to be held and was held by the town marshal or constable, and not by the sheriff of the county of Gibson, as required by sec. 1143 of the code of Tennessee in such cases; and thirdly, because, as they charge, the said marshal, after the polls were opened at said pretended election, and before they were declared closed, either by himself or some pretended deputy, removed and suffered to be removed from the place in said town fixed for holding elections and receiving ballots the ballot-box, or box in which the votes were deposited to various other
18 places in said town, and did at these various places receive and put into the ballot-box the votes of certain persons offered for said purpose at these various places not fixed by law as a place of voting at said election, and this, too, without any authority whatever; and fourthly, because, as they charge, there was not only no application made to said board, as required by section 1144 of the code, but that none could have been properly made at said time, because, as they expressly charge, the entire line of the contemplated road in which the stock was to be taken had not been surveyed by a competent engineer and substantially located by designating the termini and approximating the general direction of the road, and no estimate of the grading, embankment, and masonry had been made by the engineer of said road, or any one
19 else authorized to do so under oath or otherwise; and no such — as required by section 1145 of the code of Tennessee has ever been filed with the board of mayor and aldermen of said town

by any one; and lastly, complainants charge, on information and belief, that at the time of ordering said election and at the time it was pretended to be held the population of Milan was less than one thousand inhabitants, and therefore not authorized by law to take stock in railroads, issue bonds, or levy a tax for their payment. Notwithstanding all these facts the said board of mayor and aldermen did, on the 23rd day of June, 1873, make the following order, to wit: "On motion of W. M. McCall, the mayor was instructed to issue twelve bonds to the said Mississippi Central Railroad
20 Company, of the denomination of $1,000.00 each, with interest from date of issuance at the rate of 7 per cent. per annum," and thereupon said mayor did prepare 12 bonds, designated as the "Bonds of the Town of Milan," of $1,000.00 each, payable to the Mississippi Central Railroad Company or bearer 20 years from date of issuance, and dated July 1st, 1873, bearing 7 per cent. interest per annum, to which bonds there were attached coupons for the payment of said interest on the 1st day of July of each year said bonds have to run. Each one of said bonds and coupons thereto attached were signed by A. Jordan, mayor and recorder, and were issued on that date; and on the 4th day of August, 1873, said bonds, with the coupons attached, were delivered to said Mississippi Cen-
21 tral Railroad Company through James Hall, the treasurer and cashier of said road, who executed the following receipt:

MILAN, *August 4th*, 1873.

Received from A. Jordan, mayor of Milan, Tenn., twelve thousand dollars in bonds of the Town of Milan, Tenn., 12 bonds of $1,000.00 each, payable 1st July, 1893, interest at the rate of 7 per cent. per annum, payable annually on the first July in each year.

JAMES HALL,
Cashier Southern R. Association.

Said bonds and interest were made payable, as — believe, in the city of New York, N. Y.

Complainants further charge that said bonds, with the coupons, one year's interest on which was due July first, 1874, are still in possession of said Hall or some other officer or agent of said
22 Mississippi Central Railroad Company, or under their control or management, and complainants are advised that they are attempting to collect the interest due on said bonds.

Complainants are advised that they are not bound as a corporation or otherwise to pay said bonds; that their issuance was contrary to law, but they are advised that should said company sell said bonds to innocent purchasers they would be bound in law to pay the same; and they are advised and believe and so charge that the officers of said road will sell and assign said bonds with the view of making said corporation of Milan liable, if they have not already done so, in part.

Complainants further charge that said Mississippi Central Rail-

road Company, by its officers and agents, as they are advised
22½ and believe and so charge, are attempting to negotiate said bonds, and will do so unless restrained by the timely interposition of you- honor's writ of injunction.

The premises considered, complainants pray that they be allowed to file this bill in their official capacity and as individual tax-payers of the town of Milan, for themselves and on behalf of all the tax-payers of said town, against the Mississipi Central Railroad Company, under lease and control of the Southern Railroad Association, which said railroad is located and operated through the 13th civil district in Gibson county, Tenn., with an office and place of business in the town of Milan, in said 13th civil district, and a local agent or agents there, and against James Hall, treasurer, and a citizen of Madison county, Tennes-
23 see, and against H. S. McComb, who is the president of said Mississippi Central Railroad Company, under lease of the Southern Railroad Association, and is a citizen and resident of New York city, in the State of New York; that s'p'as and copy issue to sheriff of Gibson county, Tenn., commanding the said Mississippi Central Railroad Company to answer this bill; that s'p'as and copy issue to Madison county, Tenn., requiring said James Hall to answer this bill on oath and state in whose possession and under whose control said bonds are, and if assigned, sold, hypothecated, or otherwise disposed of let him state when, where, to whom, and for what consideration; and that publication be made as to said H. S. McComb requiring him also to answer under oath to the inter-
24 rogatories put to James Hall, and that in the meantime let an injunction issue restraining said Mississippi Central Railroad Company, as well as the said James Hall and H. S. McComb and all the officers, agents, and attorneys of said company or of the said Hall and McComb, from selling, transferring, assigning, pledging, or in any other manner disposing of the said bonds or coupons thereto or from collecting the same; and, on final hearing, they, for themselves and other tax-payers, pray that said bonds and coupons be delivered up and cancelled and that said injunction be made perpetual, and if it should appear that in the progress of the cause *that* any of said bonds have been disposed of to third persons they ask to have them made defendants, if necessary, for the protection of the rights of their —; and pray for general relief.

25 This is the first application for writs of injunction in this cause.

JOHN L. WILLIAMSON, *Sol.*

STATE OF TENNESSEE, *County of Haywood:*

Personally appeared before me, Alexander Duckworth, C. and M. chancery court, at Brownsville, Haywood county, Tenn., Arch. Jordan, one of the complainants in the foregoing bill, and made oath in due form of law that the facts set forth in the foregoing bill as of his own knowledge are true, and those on information and belief he believes to be true.

ARCH. JORDAN.

Subscribed and sworn to before me this July 10th, 1874.

ALEX. DUCKWORTH,
C. and M.

STATE OF TENNESSEE, *Haywood County:*

The clerk and master of the chancery court at Humboldt,
26 Tennessee, will issue the writ of injunction as prayed for in the foregoing bill, upon complainants giving bond with security in the sum of one thousand dollars, conditioned and payable as required by law in such cases.

July 10th, 1874.

H. J. LIVINGSTONE,
Chancellor 10th Chancery Division of Tennessee.

The Demurrer.

In the Chancery Court at Humboldt, Tennessee.

A. JORDAN and G. BOYD, M. L. BAIRD, W. G. WILLIAMSON, S. F. RANKIN, J. H. DICKSON

vs.

MISS. CENT. RAILROAD, H. S. MCCOMBS, and JAMES HALL.

The defendants demur to complainants' bill and for cause of demurrer say:

27 First. Because there is no equity in the bill of complainants to entitle them to a decree.

Second. Because the bonds having been determined by order of the board of mayor and aldermen, as alleged in the bill of complainants, they cannot set up irregularities or departure from duty on part of themselves to evade responsibility on the bonds.

Third. Because complainants do not allege or pretend that the railroad company has failed to keep its contract.

Fourth. Because the allegation on which the decree is asked to relieve the Town of Milan from payment of its bonds rests on the misconduct and irregularities of its corporate authorities, and the corporation cannot take advantage of its own wrong.

28 Defendants therefore pray judgment whether they should any other or further answer make to complainants' bill.

M. BROWN,
Solicitor for Defendants.

And the following is the final decree thereon:

A. JORDAN, W. I. HOUSE, J. Q. BOYD, M. L. BAIRD, W. Y. WILLIAMSON, S. F. Rankin, *et als.*, Mayor and Aldermen of the Town of Milan,

vs.

THE MISSISSIPPI CENTRAL RAILROAD COMPANY, H. S. MCCOMB, and JAMES HALL.

Be it remembered that this cause, this 9th of January, 1875, came on to be heard and was heard before Hon. John Somers, chancellor,

&c.; and it appearing that this suit had been settled by the
29 following agreement, to wit: Whereas the Board of Mayor and Aldermen of the Town of Milan, in Gibson county, Tennessee, have filed a bill in the chancery court at Humboldt against the Mississippi Central Railroad Company to enjoin the collection of certain bonds issued by the Town of Milan to aid in the construction of said road, to wit, twelve bonds of $1,000.00 each, with coupons attached, and said suit is now pending in said court; and whereas it is agreed by and between said corporation of the Town of Milan and the New Orleans, St. Louis and Chicago Railroad Company, into which said Mississippi Central R. R. Co. has been merged by contract of consolidation between said last-named company and the New Orleans, Jackson and Great Northern R. R. Co., that
30 said suit be compromised as follows, to wit: The said New Orleans, St. Louis and Chicago R. R. Co. is to issue to the Town of Milan certificate of stock in the sum of $500 each, dollar for dollar for said bonds, and the said Town of Milan on their part agrees, on receipt of said stock, to let a decree be entered in said cause in favor of the validity of said bonds, which are to be redelivered, with the seal of the town affixed, and the costs of said suit to be paid by the said New Orleans, St. Louis and Chicago R. R. Co.

In testimony whereof we herewith sign our names and affix our official seal this December 18th, 1874.

A. JORDAN, *Mayor.*
A. M. WEST,
2nd Vice-President N. O., St. Louis & C. R. R. Co.

31 In pursuance of this agreement and by consent of the parties it is ordered, adjudged, and decreed that the New Orleans, St. Louis and Chicago R. R. Co. shall issue to the Town of Milan certificates of stock in said company in sums of $500 each, dollar for dollar, for said twelve bonds of $1,000 each, referred to in the bill, and it is further ordered, adjudged, and decreed that on the presentation of these certificates of stock the Town of Milan shall have the corporate seal of said town affixed to each of said twelve bonds and delivered to H. S. McComb, to whom they rightfully belong, or his authorized agent, and said bonds and coupons attached are declared to be valid and binding on said town and its authorities. It is, by consent, further ordered, adjudged, and
32 decreed that the injunction be dissolved, the demurrer herein filed be, and the same is hereby, overruled, and this decree is declared a final settlement of the right of the parties; the New Orleans, St. Louis and Chicago Railroad Company to pay the costs, and this case only retained on the docket so far as is necessary to enforce the final execution of this decree.

Sixth. It is further agreed that the plaintiffs may file and read the affidavits of S. F. Rankin, R. F. Harris, or other residents of said town, and that the defendant may file and read the affidavits of E. A. Collins, S. H. Hale, and David Taylor, such affidavits to relate to the question of the population of said town in 1873, and to be considered as evidence herein.

It is further agreed that, upon the consideration of this
33 motion for a new trial, the defendant shall not be prejudiced by the default herein taken, but the court will consider the case as now on trial on its merits and render judgment accordingly, and on any appeal taken this shall be the bill of exception with other parts of the record.

That the records of said town were destroyed by fire in 1879, and no census, authorized by law, of the town was taken before 1880, when the population was ascertained to be 1,600.

That in another suit by other parties against said defendant, not affecting the issue herein, it was proven by A. Jordan, the then mayor of said town, as follows:

Question. "State if, at the election on said proposition,
34 three-fourths of the qualified voters of said town voted in favor of subscribing the bonds as compared with the gubernatorial election next preceding the same; and if you know how many votes were so polled in favor of said proposition and how many against, please state it."

Answer. "I don't know; my recollection is that there were 60 for it and three votes against it; the voting population was about 250."

This was in reference to another proposed subscription by said town to the Tennessee Central Railroad Company, which has been declared invalid by the Tennessee supreme court.

It is further agreed that said railroad was not completed to said town until after July, 1873.

Seventh. That after said final decree in said chancery court the plaintiffs became the owners of said bonds, with the coupons
35 attached, purchasing same for value and before due.

Said copy of bill in Humboldt chancery —, affidavits, and briefs of counsel will be filed with Hon. E. S. Hammond, judge, &c., on or before the 15th December, 1883, and the cause be then submitted upon this record.

That in the proposition submitted to the voters in defendant town the question of subscribing $12,000 to the stock of said railroad company, payable in said bonds, was also submitted in one question and at one and the same time, and was so approved by the requisite majority.

It is agreed that the original agreement under which said chancery decree was rendered is not on file and has been lost.

HOLMES CUMMINS,
Atto'n'y for Plaintiffs.

36 SP'L HILL,
Attorney for Defendant.

The parties also filed their amended stipulations, which is as follows:

Amended Stipulations.

In the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee, at Jackson, Tennessee.

KELLY AND ALEXANDER

vs.

MAYOR AND ALDERMEN of MILAN.

In this cause the stipulations of the parties on file is hereby *hereby* amended as follows:

1st. The coupons sued on in the declaration are produced, and it is agreed that they are in the form of which the following is a copy:

37 *Town of Milan.*

$35. Warrant for thirty-five dollars, being for six months' interest, payable on the first day of July, 1880, in the city of New York, on bond.

No. —. A. JORDAN,
Mayor of the Town of Milan, Tenn.

2nd. The defendant agrees that the signatures to said coupons and bonds are genuine.

3rd. The parties hereby agree that the issues of fact in this case may be tried by the court without the intervention of a jury, which is waived, and that all proper orders and decrees shall be
38 hereafter entered to conform the record to the rulings of the court, and each side reserves and hereby takes all proper exceptions to the testimony offered in the stipulations, so far as it applies to either side, for incompetency and irrelevancy, all other exceptions being waived.

HOLMES CUMMINS,
Atto. for Plaintiff-.
SP'L HILL,
Atto. for Defendant.

The plaintiffs on the trial offered in evidence the coupons sued on, together with the bonds from which they were detached, the genuineness of the *sygnatures* being admitted; to which the defendant objected because said coupons and bonds were signed, sealed, and delivered by the constituted authorities of Milan without any
39 legislative authority whatever in said authorities or in said defendant or its agents to sign, seal, or deliver or issue said coupons or bonds; and the court, being of the opinion that this objection was well taken, sustained the same and excluded said coupons and bonds; to which the plaintiff then and there excepted.

The plaintiffs then offered in evidence the record of the chancery court at Humboldt found in the foregoing stipulations; to which the defendant, waiving all other objections, excepted because the said

record showed upon its face that it was not binding in law upon them as a matter of adjudication, and therefore did not sustain the plaintiffs' replication to the defendant's plea; and the court, being of the opinion that the objection was well taken, sustained the same; to which the plaintiff then and there excepted.

The affidavits as to the population of the town of Milan at the time these bonds and coupons were issued were then offered by both parties, all exceptions being waived, and the court found, as one of the facts to support its judgments, that at said date the town of Milan did not contain one thousand inhabitants.

And thereupon the plaintiffs tenders this bill of exceptions and prayed that the same might be signed, sealed, and allowed to be filed as a part of the record in this case; all of which was accordingly done.

Jackson, Tenn., Nov. 11th, 1884.

41–102 E. S. HAMMOND, [SEAL.]
Judge, &c.

In this cause a judgment by default was first taken against defendant. That was, after consideration by his Honor, Judge Hammond, set aside.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE AT JACKSON.

DECLARATION.

Albert Kelley and Lawrence D. Alexander, who sue as partners under the firm name of Kelley & Alexander,

vs.

The Mayor and Aldermen of Milan, a municipal corporation, within said Division.

The said plaintiffs, who are residents of the city and State of New York, and are citizens of that State, sue the said defendant, who is a municipal corporation, organized under the laws of the State of Tennessee, having its *situs* in the county of Gibson, in that State, for the sum of twenty thousand dollars, which they say is due to them from the said defendant upon certain one hundred and forty-four (144) coupons, each for the sum of $35.00, upon or from certain twelve (12) bonds of the defendant, bearing date the 1st of July, A.D. 1873, each for the sum of $1000.00, payable to the Mississippi Central Railroad Company, etc., or bearer, on the 1st of July, 1893; twenty-four (24) of which coupons matured on the 1st of July, A.D. 1876; another twenty-four on the 1st July, 1877; another twenty-four on the 1st July, 1878; another twenty-four on the 1st July, 1879; another twenty-four on the 1st July, 1880, and the other twenty-four matured on the 1st July, 1881, and each of the same, with interest from the dates of their respective maturities, are now past due, and are unpaid. Said bonds are Nos. 1 to 12, both numbers inclusive, and constitute the entire number of said issue by the defendant, of which said bonds and coupons the said plaintiffs are the owners by purchase, in good faith. Said coupons are here to the court shown, and said bonds will be produced if and when required by the court. The said bonds upon their face stipulate to bear interest at the rate of seven (7) per centum per annum, and mature on the 1st day of July, A.D. 1893.

And the said one hundred and forty-four coupons on said bonds, now being past due and unpaid, together with interest on each from its maturity, to the damage of the plaintiffs' twenty thousand dollars as aforesaid, therefore they bring this suit.

HOLMES CUMMINS,
Att'y for said plaintiffs, Kelley & Alexander.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE, AT JACKSON, TENN.

PLEA.

Albert Kelley and Lawrence D. Alexander, partners, etc., under the firm name of Kelley & Alexander,

vs.

The Mayor and Aldermen of Milan, a municipal corporation within said Division.

And now comes the defendants, and for plea, say that it did not make the coupons mentioned in the plaintiffs' declaration, or the bonds to which the same are attached, nor was any person whatever authorized to make the same for the defendant, wherefore defendant says that said coupons are not its act and deed, and of this it puts itself upon the country.

SP'L HILL, AND
GANTT & PATTERSON,

S. H. Hale, mayor of defendants' corporation sued herein, makes oath in due form before me, H. E. Archer, clerk, etc., that the foregoing plea is true in substance and fact. Sworn and subscribed before me, this 3d May, 1884. S. H. HALE, Mayor, etc.

REPLICATION.

And the said plaintiff comes, and for replication to the defendant's plea above, says that heretofore, in the chancery court for the county of Gibson, in Tennessee, at Humboldt, and before one of the chancellors of said State, the defendant instituted suit against the payee of said bonds, and certain other persons, holders thereof, by filing its bill in said chancery court against said Mississippi Central Railroad Company, H. S. McComb and others, alleging that said bonds were invalid, and praying to have same so adjudged, and to be surrendered to the defendant herein and cancelled; and thereafter, to-wit, on the —— day of January, 1875, in said chancery court, a court of competent jurisdiction, said parties, complainants and defendant, being before the court, a decree final was rendered, adjudging and decreeing that said bonds and coupons were legal, and valid and binding obligations against said complainant therein, the town of Milan, who is the same defendant herein, a full and true copy of which decree is herewith filed as a part and parcel of this replication, as though herein set forth in so many words. Wherefore the plaintiff says that said matters are *res adjudicata*, and this the plaintiffs reply to defendants' said plea above, and are ready to verify, etc.

HOLMES CUMMINS,
Attorney for Plaintiff.

ISSUE.

And then the plaintiffs by leave of the court first had and obtained, also takes issue with the defendant on its plea, by it above set forth and pleaded, hereby in nothing waiving their replication thereto above, etc.

HOLMES CUMMINS,
Attorney for Plaintiffs.

CIRCUIT COURT OF THE UNITED STATES

FOR EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE AT JACKSON, TENNESSEE.

REPLICATION.

Kelly & Alexander

vs.

The Mayor and Aldermen of Milan.

1st. And now comes the defendant, and for rejoinder to the plaintiffs' replication setting up the defense of *res adjudicata*, says that the said decree relied upon for said defense whilst rendered in the cause mentioned in said replication is not conclusive on it and ought not to effect its right, and because it avers, sets forth and pleads that said decree was brought about and procured by imposition, combination and fraud between the said A. M. West as vice-president of the New Orleans, St. Louis and Chicago Railroad Company, and the agents and attorneys of this defendant, by which a decision and sentence in said cause of the court upon the matters involved for trial were prevented, and that said decree was designed, as no honest exposition of the merits of the case, but was brought about, allowed and consented to for the purpose of giving the same effect as *res adjudicata* upon points in litigation not honestly contested.

2d. And for further rejoinder to said plea of *res adjudicata* this defendant says it ought not to be concluded or estopped by said decree, because it was not the result of honest litigation or the judgment of the court upon the issues involved in said cause, but was brought about and founded upon the unauthorized consent of certain agents and attorneys of defendant, who had no power to give such consent or bind defendant in the premises.

3d. And for further rejoinder to said plea of *res adjudicata* the defendant says that it ought not to be concluded by said decree for the reason that the same was not rendered upon the issues involved in the cause in which it was pronounced, and the court rendering the same was without power to bind or conclude this defendant thereby.

4th. And for further rejoinder the defendant says it is not concluded by said decree, because it was not rendered in favor of a party to the record, but in the interest and behalf of a stranger thereto, who colluded with the agents and attorneys of this defendant and thereby prevented and defeated the honest and earnest litigation which said cause was instituted for the purpose of having tried and determined.

5th. And for further rejoinder the defendant says it ought not to be concluded by said decree, because the suit in which it was pronounced was begun by defendant for the purpose of honestly and earnestly contesting and having declared void certain so-called bonds executed in the name of the defendant, but without authority or power to bind defendant by the same, and thereafter certain persons combined with the agents and attorneys of this defendant to defeat the purposes of said litigation and to procure a decree without trial and sentence of the court, but by the unauthorized consent of the agents and attorneys of defendant and without the point being in fact litigated, to have said bonds declared valid and binding obligations of this defendant, in the manner so stated in said decree, all of which was the result of fraud and collusion, therefore without force and effect as *res adjudicata* the said bonds so pretended to be declared valid by said fictitious litigation, being the same bonds on which the coupons sued on in this action were attacked.

SP'L HILL, AND
GANTT & PATTERSON,
Attorneys.

THE CIRCUIT COURT OF THE UNITED STATES

FOR EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE AT JACKSON, TENNESSEE.

PLEA.

Kelly & Alexnder

vs.

The Mayor and Aldermen of Milan.

And the defendant, the mayor and aldermen of the town of Milan, comes by their attorneys and for further plea says that the plaintiffs are not bona fide holders without notice of the bonds or coupons in the declaration mentioned, as the plaintiffs in their declaration last alleged, &c.

SP'L HILL, AND
GANTT & PATTERSON,
Attorneys for Defendants.

IN THE CIRCUIT COURT OF THE UNITED STATES
AT JACKSON, TENNESSEE.

DEMURRER.

Kelley & Alexander

vs.

Mayor and Aldermen of Milan.

In this cause said plaintiffs demur to the several rejoinders filed herein by the defendant to the replication of the plaintiff herein, and for causes of demurrer say:

First. Neither of said rejoinders nor the matters therein set up and pleaded constitute any defense in law, and are not sufficient in law for answer or defense to plaintiffs' said replication of *res adjudicata* or estoppel by judicial decree.

Second. That defendant having been a party to said cause and decree set up and pleaded in plaintiffs' said replication, cannot be heard in this collateral proceeding to aver or plead that said decree final, etc., was procured by fraud or collusion or imposition. Said defendant being a party to that cause and that decree, can only avail itself of such matter against it by a direct proceeding to annul the said decree for such fraud, etc.

Third. That defendant in this collateral proceeding can not avail itself of the matter that the action of its agents in consenting to said decree set up by plaintiffs in their said replication was unauthorised, etc., because defendant can only act through its Mayor, its chief executive, and to impeach said decree for that account must so do in a direct proceeding for that end, defendant having been a party thereto.

Fourth, That said chancery court being a court of general jurisdiction, and in said cause that jurisdiction having been invoked by defendant as complainant therein, it is concluded by said final decree as to all questions involved in the subject matter therein, and said decree adjudges the same issue against defendant that it now sets up anew.

Fifth. And that defendant being a party to said cause and said decree, is bound thereby until same has been set aside in a direct proceeding for that end, and cannot in this collateral proceeding plead that either a stranger or a party thereto colluded with defendants' agents to prevent and defeat honest and earnest litigation therein.

Wherefore, etc.

HOLMES CUMMINS,
Attorneys for Plaintiffs.

IN THE CIRCUIT COURT OF THE UNITED STATES

AT JACKSON, TENN., FOR THE EASTERN DIVISION OF WEST TENNESSEE.

STIPULATION.

Kelly & Alexander

vs.

The Mayor and Aldermen of Milan.

In this cause it is agreed between the parties that the statements herein are true, and the same may be used and relied on by either or both parties, as evidence on any hearing or trial of this cause, or on any motion for a new trial, same being the facts connected with matters in controversy, viz:

First. That the coupons sued on were issued with and represent interest upon bonds issued by defendant in payment of a stock subscription made by defendant on the —— day of ———, 187—, to the Mississippi Central Railroad Company.

Said subscription was for the sum of $12,000, and in payment thereof (12) twelve bonds, each for the sum of $1000, were issued bearing date the —— day of ———, 187—, and payable 20 years thereafter, with said coupons and others of like amounts thereto attached, representing the interest on said bonds.

Second. That at the time of making such subscription said railroad company was about to extend its line from Jackson, Tenn., to Cairo, Ill., and said subscription was to aid in making such extension, and to secure its location through defendant's town.

Third. That said railroad extension was completed on the - —— day of ———, 1873, the same running through defendant's town limits as it stipulated for. And the same has been operated ever since that date.

Fourth. The following is a copy of one of said bonds, the others being the same except as to numbers:

"No. 1. $1000

STATE OF TENNESSEE,

TOWN OF MILAN.

Be it known, That the town of Milan, by its mayor and aldermen, in consideration of the location of the Mississippi Central Railroad, by said town' the citizens thereof, in pursuance of the laws of Tennessee, authorizing the same, having agreed to issue bonds payable on twenty years time, to the amount of twelve thousand dollars, with annual interest at seven per cent., with coupons attached in bonds of one thousand dollars each.

"*And whereas*, The people of Milan voted the same by a majority, and in the form required by law, the vote being in pursuance of due notice, and in all respects according to the laws of Tennessee, said bonds to be payable to the Mississippi Central Railroad, under lease and control of the Southern Railroad Association.

"*Now be it known*, That the town of Milan, by its mayor and aldermen, in pursuance of the authority given by the people thereof, and in obedience to the duty required of them, issues and delivers this bond, being one of twelve, and said town of Milan hereby acknowledges itself to owe and be indebted to ——— or bearer in the sum of one thousand dollars, which sum said town of Milan binds itself to pay in lawful money of the United States, to the Mississippi Central Railroad Company, or to the order of the Southern Railroad Association or bearer, in the city of New York, on or before the first day of July, in the year of our Lord one thousand eight hundred

and ninety-three, with interest at the rate of seven per cent. per annum, payable annually on the first day of July of each year, on presentation of the proper coupons hereto annexed.

"And the town of Milan, by its mayor and aldermen, hereby pledges the legal responsibility and the faith of said town for the payment of said coupons and bond according to the terms and effect hereof.

"In testimony whereof the mayor and aldermen of the town of Milan have caused the signature of the mayor to be hereto set, and the seal of the corporation to be affixed, this first day of July, 1873, A. D.

A. JORDAN,

[L.S.] Mayor of the Town of Milan."

Fifth. That on or about the 10th of July, 1874, said A. Jordan and others, residents and tax-payers of said town of Milan, instituted proceedings in one of the courts of chancery of said State, to-wit: In the chancery court at Humboldt, in Gibson county, for the purpose of avoiding the liability of said town upon said bonds, the said railroad company and others being made defendants thereto.

The following is a full and true copy of said proceedings and of the decree, the same being final, rendered by said chancery court thereon.

Said decree was not appealed from, and still remains in full force, viz:

THE BILL.

To the Hon. John Somers, Chancellor, Holding the Chancery Court at Humboldt, Gibson County, Tenn.:

Complainants A. Jordan, W. J. House, J. G. Boyd, M. L. Baird, Wilson G. Williamson, S. F. Rankin and J. H. Dickinson, show to your honor that they are citizens and residents of the town of Milan, in the 13th civil district of said county; that said town of Milan is by law an incorporated town or city, and complainants reside within the corporate limits, and are tax-payers within said corporation; and the said Jordan is the legally elected and qualified, and acting mayor of said town, and the other complainants are the aldermen of said town, duly elected and qualified, and together constitute the board of mayor and aldermen in and for said town or city.

Complainants further show that they were duly qualified, and entered upon the discharge of their duties as mayor and aldermen of said town on the 12th of January, 1874, and their term of office continuing for one year from the date of qualification.

Complainants further show that upon an inspection and examination of the minutes and record of the proceedings of their predecessors in office, they find the following entry, of date May the 11th, 1872: "The board was convened by order of the mayor. Present—A. Jordan, mayor, W. M. McCall, M. B. Harris, J. H. Dickinson, J. M. Douglass, W. E. Reeves, W. H. Algea, aldermen. On motion, it was ordered that 12 bonds of $1000 each, with coupons attached, payable 20 years after issuance, bearing interest at 7 per cent. per annum, be issued by the corporation of the town of Milan, Tenn., to the Mississippi Central Railroad Company, upon the following conditions, namely: That the Mississippi Central Railroad Company be extended from Jackson, Tenn., to the town of Milan, and intersect or cross the Memphis and Louisville Railroad at the point agreed upon by Col. Read, chief engineer of the Mississippi Central Railroad, and the committee on behalf of the corporate authorities of the town of Milan, near S. P. Clark's residence; the interest on said bonds to be paid annually, and that the town marshal open and hold an election on the 12th day of June, 1872, within the corporate limits of said town, for a ratification or rejection of said proposition," and on the 17th day of June, 1872, said board again met,

when the following proceedings were had, as appears from the said minutes:

"The board met pursuant to adjournment. Present—A. Jordan, mayor, W. M. McCall, M. B. Harris, J. M. Douglass, W. H. Algea and W. E. Reeves, aldermen. The minutes of the former meeting were then read and adopted. The election was held on the 12th day of June, 1872, for the ratification or rejection of the action of the board of mayor and aldermen of the town of Milan in regard to the issuance of the $12,000 in bonds to the Mississippi Central Railroad Company, upon certain conditions. The returns of said elections show a vote of 117 for subscription, and two no subscription," and at the same meeting appears the following entry: "W. M. McCall and W. H. Algea were appointed a committee to correspond with Judge Milton Brown, of Jackson, Tenn., in regard to the proposition of Milan corporation in regard to issuing the $12,000 in bonds to the Mississippi Central Railroad Company." Complainants show that the foregoing entries, all of which appear upon the minutes of said board of mayor and aldermen, constitute all the proceedings in regard to the subscription of said $12,000 in bonds, and in regard to the election held for ratification or rejection of their action in directing the issuance of said bonds.

Complainants charge that there is nothing to show the manner in which said election was held, or by whom the returns thereof were made, nor is there anything to show that the requirnd number of votes were polled in favor of said proposition, as required by law.

Complainants further charge that the order or ordinance of said Board, directing the issuance of said bonds, was wholly without authority, illegal and void. First, because, as they charge, that said ordinance was adopted and said election ordered without any previous, contemporaneous, or subsequent application in writing or otherwise, to said Board, for said purpose by commissioners appointed to open subscription books, for stock to said Board; or by the Board of Directors themselves, or by any one else authorized so to do, as required by sec. 1144 of the Code of Tennessee; and secondly, because said election was ordered to be held, and was held by the town marshal or constable, and not by the sheriff of the county of Gibson, as required by section 1143 of the Code of Tennessee, in such cases; and thirdly, because, as they charge, the said marshal, after the polls were opened at said pretended election, and before they were declared closed, either by himself or some pretended deputy, removed and suffered to be removed from the place in said town fixed for holding elections and receiving ballots, the ballot box, or box in which the votes were deposited, to various other places in said town, and did at these various places receive and put into the ballot box the votes of certain persons offered for said purpose at these various places, not fixed by law, as a place of voting at said election, and this, too, without any authority whatever; and fourthly, because, as they charge, there was not only no application made to said board. as required by section 1144 of the Code, but that none could have been properly made at said time because, as they expressly charge, the entire line of the contemplated road in which the stock was to be taken had not been surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road, and no estimate of the grading, embankment and masonry had been made by the engineer of said road, or any one else authorized to do so under oath, or otherwise; and no such estimate as required by section 1145 of the Code of Tennessee has ever been filed with the Board of Mayor and Aldermen of said town by any one. And lastly, complainants charge on information and belief, that at the time of ordering said election, and at the time it was pretended to be held, the population of the town of Milan was less than one thousand inhabitants, and therefore not authorized by law to take stock in railroads,

issue bonds or levy a tax for their payment. Notwithstanding all these facts the said Board of Mayor and Aldermen did, on the 23d day of June, 1873, make the foliowing order, to-wit: "On motion of W. M. McCall, the mayor was instructed to issue twelve bonds to the said Mississippi Central Railroad Company, of the decomination of $1000.00 each, with interest from date of issuance at the rate of 7 per cent. per annum," and thereupon said mayor did prepare 12 bonds, designated as the "Bonds of the Town of Milan," of $1000.00 each, payable to the Mississippi Central Railroad Company, or bearer, 20 years from date of issuance, and dated July 1st, 1873, bearing 7 per cent. interest per annum, to which bonds then were attached coupons for the payment of said interest, on the first day of July of each year said bonds have to run. Each one of said bonds, and the coupons thereto attached, were signed by A. Jordan, Mayor and Recorder, and were issued on that date. And on the 4th day of August, 1873, said bonds, with the coupons attached, were delivered to said Mississippi Central Railroad Company, through James Hall, the treasurer and cashier of said road, who executed the following receipt:

MILAN, August 4th, 1873.

Received from A. Jordan, Mayor of Milan, Tenn., twelve thousand dollars in bonds of the town of Milan, Tenn., 12 bonds of $1000.00 each, payable 1st July, 1893, interest at the rate of 7 per cent. per annum, payable annually on the first July in each year. JAMES HALL,

Cashier Southern R. Association.

Said bonds and interest were made payable, as —— believe, in the city of New York, N. Y.

Complainants further charge that said bonds, with the coupons, one year's interest on which was due July first, 1874, are still in the possession of said Hall, or some other officer or agent of said Mississippi Central Railroad Company, or under their control and management; and complainants are advised that they are attempting to collect the interest due on said bonds.

Complainants are advised that they are not bound as a corporation or otherwise to pay said bonds; that their issuance was contrary to law; but they are advised that should said company sell said bonds to innocent purchasers, they would be bound in law to pay the same; and they are advised and believe, and so charge, that the officers of said road will sell and assign said bonds, with the view of making said corporation of Milan liable, if they have not already done so in part.

Complainants further charge that said Mississippi Central Railroad Company, by its officers and agents, as they are advised and believe, and so charge, are attempting to negotiate said bonds, and will do so unless restrained by the timely interposition of your Honor's writ of injunction.

The premises considered, complainants pray that they be allowed to file this bill in their official capacity, and as individual taxpayers of the town of Milan, for themselves, and on behalf of all the taxpayers of said town, against the said Mississippi Central Railroad Company, under lease and control of the Southern Railroad Association, which said railroad is located and operated through the 13th Civil District in Gibson county, Tenn., with an office and place of business in the town of Milan, in said 13th Civil District, and a local agent or agents there, and against James Hall, treasurer, and a citizen of Madison county, Tennessee; and against H. S. McComb, who is the president of said Mississippi Central Railroad Company, under lease of the Southern Railroad Association, and is a citizen and resident of New York city, in the state of New York; that spa's and copy issue to sheriff of Gibson county, Tenn., commanding the said Mississippi Central Railroad Company to answer this bill; that spa's and copy issue to Madi-

son county, Tennessee, requiring said James Hall to answer this bill on oath, and state in whose possession and under whose control said bonds are, and if assigned, sold, hypothecated, or otherwise disposed of, let him state when, where, to whom and for what consideration; that publication be made as to said H. S. McComb, requiring him also to answer under oath to the interrogatories put to James Hall, and that in the meantime let an injunction issue, restraining said Mississippi Central Railroad Company, as well as the said James Hall, and H. S. McComb, and all the officers, agents and attorneys of said company, or of the said Hall and McComb, from selling, transferring, assigning, pledging or in any other manner disposing of said bonds, or coupons thereto, or from collecting the same; and on final hearing, they for themselves and other taxpayers, pray that said bonds and coupons be delivered up and cancelled; that said injunction be made perpetual, and if it should appear in the progress of the cause that any of said bonds have been disposed of to third persons, they ask to have them made defendants, if necessary, for the protection of the rights of their ———. And they pray for general relief. This is the first application for writs of injunction in this cause.

JOHN L. WILLIAMSON, Sol.

STATE OF TENNESSEE, }
COUNTY OF HAYWOOD. }

Personally appeared before me, Alexander Duckworth, C. and M. chancery court, at Brownsville, Haywood county, Tenn., Arch Jordan, one of the complainants in the foregoing bill, and made oath in due form of law that the facts set forth in the foregoing bill as of his own knowledge are true, and there on information he believes to be true.

ARCH JORDAN.

Subscribed and sworn to before me, this July 10th, 1874.

ALEX. DUCKWORTH, C. and M.

STATE OF TENNESSEE, }
HAYWOOD COUNTY. }

The clerk and master of the chancery court at Humboldt, Tennessee, will issue the writ of injunction as prayed for in the foregoing bill, upon complainants giving bond with security in the sum of one thousand dollars, conditioned and payable as required by law in such cases.

July 10, 1874. H. J. LIVINGSTONE,
Chancellor 10th Chancery Division of Tennessee.

THE DEMURRER.

IN THE CHANCERY COURT AT HUMBOLDT, TENNESSEE.

A. Jordan and G. Boyd, M. L. Baird, W. G. Williamson, S. F. Rankin, J. H. Dickinson

vs.

Miss. Cent. Railroad, H. S. McCombs and James Hall.

The defendants demur to complainants' bill and for cause of demurrer say:

First. Because there is no equity in the bill of complainants to entitle them to a decree.

Second. Because the bonds having been determined by order of the Board of Mayor and Aldermen, as alleged in the bill of complainants, they cannot set up irregularities or departure from duty on part of themselves to evade responsibility on the bonds.

Third. Because complainants do not allege or pretend that the railroad company has failed to keep its contract.

Fourth. Because the allegation on which the decree is asked to relieve the town of Milan from payment of its bonds rest on the misconduct and irregularities of its corporate authorities, and the corporation cannot take advantage of its own wrong.

Defendants therefore pray judgment whether they should any other or further answer make to complainants' bill.

M. BROWN,
Solicitor for Defendant.

And the following is the final decree thereon :

A. Jordan, W. I. House, J. Q. Boyd, M. L. Baird, W. Y. Williamson, S. F. Rankin, et als., Mayor and Aldermen of the town of Milan,

vs.

The Mississippi Central Railroad Company, H. S. McComb and James Hall.

Be it remembered that this cause, this 9th of January, 1875, came on to be heard and was heard before Hon. John Somers, chancellor, &c., and it appearing that this suit had been settled by the following agreement, to-wit:

Whereas, the Board of Mayor and Aldermen of the town of Milan, in Gibson county, Tennessee, have filed a bill in the chancery court at Humboldt, against the Mississippi Central Railroad Company, to enjoin the collection of certain bonds issued by the town of Milan to aid in the construction of said road, to-wit: twelve bonds of $1000 each, with coupons attached, and said suit is now pending in said court; and whereas, it is agreed by and between said corporation of the town of Milan and the New Orleans, St. Louis and Chicago Railroad Company, into which said Mississippi Central R. R. Co. has been merged by contract of consolidation between said last named company and the New Orleans, Jackson and Great Northern R. R. Co., that said suit be compromised as follows, to-wit: The said New Orleans, St. Louis and Chicago R. R. Co. is to issue to the town of Milan certificates of stock in the sum of $500 each, dollar for dollar for the said bonds, and the said town of Milan on their part agrees, on receipt of said stock, to let a decree be entered in said cause in favor of the validity of said bonds, which are to be redelivered with the seal of the town affixed, and the cost of said suit to be paid by said New Orleans, St. Louis and Chicago R. R. Co.

In testimony whereof we herewith sign our names and affix our official seal, this December 18, 1874.

A. JORDAN, Mayor.
A. M. WEST,
2d Vice-President N. O., St. Louis & C. R. R. Co.

In pursuance of this agreement, and by consent of the parties, it is ordered adjudged and decreed that the New Orleans, St. Louis and Chicago R. R. Co. shall issue to the town of Milan certificates of stock in said company in sums of $500 each, dollar for dollar for said twelve bonds of $1000 each, referred to in the bill, and it is further ordered adjudged and decreed that on the presentation of these certificates of stock, the town of Milan shall have the corporate seal of said town affixed to each of said twelve bonds and delivered to H. S. McComb, to whom they rightfully belong, or his authorized agent, and said bonds and coupons attached are declared to be

valid and binding on said town and its authorities. It is by consent further ordered adjudged and decreed that the injunction be dissolved, the demurrer herein filed be, and the same is hereby overruled, and this decree is declared a final settlement of the right of the parties.

The New Orleans, St. Louis and Chicago Railroad Company to pay the costs, and this case only retained on the docket so far as is necessary to enforce the final execution of this decree."

Sixth—It is further agreed that the plaintiffs may file and read the affidavit of S. F. Rankin, R. F. Harris, or other residents of said town, and that the defendant may file and read the affidavits of E. A. Collins, S. H. Hale and David Taylor—such affidavits to relate to the question of the population of said town in 1873, and to be considered as evidence herein.

It is further agreed that upon the consideration of this motion for a new trial, the defendant shall not be prejudiced by the default herein taken, but the court will consider the case as now on trial, on its merits, and render judgment accordingly; and on any appeal taken, this shall be the bill of exception with other parts of the record.

That the records of said town were destroyed by fire in 1879, and no census authorized by law, of the town was taken before 1880, when the population was ascertained to be 1600.

That in another suit by other parties, against said defendant, not affecting the issue herein, it was proven by A. Jordan, the then mayor of said town, as follows:

Question—"State if at the election on said proposition three-fourths of the qualified voters of said town voted in favor of subscribing the bonds as compared with the gubernatorial election, next preceeding the same, and if you know how many votes were so polled in favor of said proposition, and how many against, please state it?"

Answer—"I don't know; my recollection is that there were 60 for it, and three votes against it. The voting population was about 250."

This was in reference to another proposed subscription by said town to the Tennessee Central Railroad Company, which has been declared invalid by the Tennessee Supreme Court.

It is further agreed that said railroad was not completed to said town until after July, 1873.

Seventh—That after said final decree in said chancery court the plaintiffs became the owners of said bonds, with the coupons attached, purchasing same for value and before due.

Said copy of bill in Humboldt chancery affidavits and briefs of counsel will be filed with Hon. E. S. Hammond, Judge, etc., on or before 15th December, 1883, and the cause be then submitted upon this record.

That in the proposition submitted to the voters in defendant town the question of subscribing $12,000 to the stock of said railroad company, payable in said bonds, was also submitted in one question, and at one and the same time, and was so approved by the requisite majority.

It is agreed that the original agreement under which said chancery decree was rendered, is not on the file and has been lost.

HOLMES CUMMINS,
Attorney for Plaintiffs.
SP'L HILL,
Attorney for Defendants.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE, AT JACKSON, TENNESSEE.

AFFIDAVITS.

Kelley & Alexander,

vs.

Mayor and Aldermen of Milan.

This day personally appeared before me, A. Jordan, an acting justice of the peace for Gibson county, and U. S. Commissioner E. A. Collins, who makes oath in due form of law that he is now forty-eight years of age, and has resided in Milan, Gibson county, Tennessee, continuously since March, 1861, except from 1863 to 1865, when he was absent; and that he is well acquainted with said town, and that he was well acquainted with the proceedings had in and by said municipal corporation in its endeavor to issue its 12 negotiable bonds of $1000.00 in payment of its alleged subscription to the stock of the Mississippi Central Railroad Company, and that at the time said subscription of stock was pretended to be voted, and at the time said bonds were pretended to be issued; that the population of the town of Milan was less than 800 (eight hundred) inhabitants; that in 1871 a census was taken by L. C. Smith of the inhabitants of Milan, and the population at that time, as ascertained by actual count, was less than seven hundred; and the population never increased from the time (1871) when this census was taken as much as one hundred, if any at all, until after the completion of the Mississippi Central railroad to Milan, which was after issuance of said bonds, and that the population has more than doubled itself since the completion of said road to Milan, and since the issuance of said bonds, up to 1880, when the census was taken by R. F. Horne, as assistant or deputy census taker for the United States, when the population was ascertained to be only about (1600) sixteen hundred—less than seventeen hundred—between 1700 and 1600. The population of Milan corporation was never over 800 (if, indeed, so much) prior to August, 1873. He further states that in all elections held by said municipal corporation that it has all teh time since the organization of said corporation, been the custom for all male persons over twenty-one years of age, and entitled to vote under the State laws for members of the State legislature, and who either resided within said corporation limits or who owned real estate therein, to vote at all corporation elections; and that at all corporation elections a considerable number of the votes cast were cast by persons who were not inhabitants of said corporation, but who resided out of the limits of said corporation, but who owned real estate therein. And he further states that the voting population of Milan was and is no criterion by which the number of inhabitants or population of said town could be ascertained, for the reason before given, that a large number of said corporation voters resided without the limits of the corporation, and were no part of its population or inhabitants.

E. A. COLLINS.

Sworn to and subscribed before me Nov. 30th, 1883.

A. JORDAN, J. P.

This day personally appeared before A. Jordan, an acting J. P., etc., S. H. Hale (who is now mayor of the corporation of Milan) and D. A. Tyler, citizens of the municipal corporation, who, upon oath, state that they had

resided in and near the town Milan since the organization of said corporation, and are well acquainted with all its inhabitants, etc., etc., and that they had read the foregoing affidavit of E. A. Collins, and the statements therein contained relative to the population of Milan, and the qualified voters at all the municipal elections of said town, and the custom for persons not inhabitants of the town voting at all said municipal elections who owned real estate in said town, and each and all of the statements made by Collins in his affidavit are true.

D. A. TAYLOR, S. H. HALE,
M. D. L. JORDAN, A. C. PEARCE,
M. B. HARRIS, I. W. BLANKENSHIP,
W. B. WILLIAMS, JOSEPH WILLIAMS,
T. D. LUSK, P. B. MARTIN.

Sworn to and subscribed before me, Nov. 30th, 1883.

A. JORDAN, J. P.

I. H. BLANKENSHIP, WM. C. TURNER,
G. W. SIMS, M. L. BAIRD,
W. E. REAVES, H. L. DICKINSON,
R. F. HANN.

Sworn and subscribed before me, on the 30th Nov., 1883.

A. JORDAN, J. P.

This day personally appeared before me S. H. Hale, an acting justice of the peace, for Gibson county, Tenn. A. Jordan, who makes oath in due form of law, that he has resided within the corporation of Milan, Gibson county, Tenn., ever since the organization of said corporation, and that he was mayor of Milan for the years of 1872 and 1873 and 1874 and 1875 and 1876, and that he was well acquainted with the town and the inhabitants thereof, and that he has heard read the affidavit of E. A. Collins, hereto attached, and the statements therein contained relative to the population of Milan at the time stated in said affidavit are true, and that the statements relative to the voters or persons who voted at all municipal elections, who owned real estate in said town, are also true. And he further states that he was the successor of L. C. Smith, mayor, etc., who took the census of Milan in 1871, and that the book containing this census was delivered to the officials, and was afterward destroyed or lost, being burned in the fire at Milan in 1878, and that this book showed the population or inhabitants of Milan was less than seven hundred, and that the statements made by Collins on that subject are true. And he further states that a very large proportion of the voting population of Milan has all the time since its organization resided out of the limits of the corporation, and owned real estate therein. And he further states that L. C. Smith left Milan some years ago and went to Arkansas, and he does not know where he now resides, or whether he is living now or not. A. JORDAN.

Sworn and subscribed before me this 30th Nov., 1883.

S. H. HALE, J. P.

And now personally appeared before me S. F. Rankin, who states that he has heard read the affidavit of E. A. Collins, and the statements therein contained, relative to the population, and who voted at all corporation elections in the town of Milan, are true, to the best of his knowledge and belief, and that he was mayor of the town of Milan for the years of 1877 and 1878. S. F. RANKIN.

Sworn to and subscribed before me this 30th Nov., 1883.

A. JORDAN, J. P.

V. L. Ware, next sworn, says that he has heard read the statements in the affidavit of E. A. Collins, hereto attached, and that they are true, to the best of his knowledge and belief, so far as they refer to the population of Milan during the terms mentioned in said affidavit, and so far as the affidavit states who voted at all corporation elections. And this affidavit further states he was mayor of the town of Milan for the year of 1879, and that he was succeeded by S. H. Hale, who is the present mayor, and whose affidavit is hereto attached. V. L. WARE.

Sworn to and subscribed before me this 30th Nov., 1883.

S. H. HALE, J. P.

103 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summon the Mayor and Aldermen of Milan, citizen- of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the eastern division of the western district of Tennessee, at Jackson, in said district, on the fourth Monday in April next, and then and there to answer Albert Kelly and Lawrence D. Alexander, as partners under the firm name of Kelly & Alexander, citizens of the State of New York, in a plea of debt to the damage of the said plaintiffs (as they say) — twenty thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at said Jackson, this 9th day of March, A. D. 1882, and the 106 of American Independence.

[SEAL.] BELL W. ETHERIDGE, *Clerk*,
—— ——, *D. C.*

Know all men by these presents that we, Kelly & Alexander and Holmes Cummins, are held and firmly bound unto said defendant-, The Mayor & Aldermen of Milan, in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiffs in the circuit court of the United States for the western district of Tennessee, at said —, against the said defendants; and also on failure of the said plaintiffs to prosecute the said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals this 6th day of March, A. D. 1882.

KELLY & ALEXANDER, [SEAL.]
By their att'y, HOLMES CUMMINS. [SEAL.]
HOLMES CUMMINS. [SEAL.]

Approved by and acknowledged before me the 9th day of March, A. D. 1882.

BELL W. ETHERIDGE, *Clerk*,
—— ——, *D. C.*

At Milan, Gibson Co., Tenn., and on the 17th day of March, 1882, I executed this summons by serving a certified copy hereof personally on S. H. Hale, as mayor of town of Milan, and further served on him, at said time and place, a certified copy of declaration in this cause; and at said time and place I made further service of this summons by serving a certified copy hereof personally on R. F. Hann, W. H. Coley, A. B. Conley, Eli N. Stone, D. A. Taylor, and J. H. Blankenship, each as aldermen of the town of Milan, Gibson county.

M. T. WILLIAMSON,
U. S. Marshal, W. D. Tenn.

1 serv. dec.	2 00
7 serv. sum.	14 00
R. R. fare	5 50
Horse hire	1 00
Subsistence	2 50
	$25 00

[Endorsed:] No. 20. U. S. — court, western dist. Tennessee. Kelly & Alexander *vs.* Mayor & Aldermen of Milan. Summons. Returnable to April term, 1882. Holmes Cummins, attorney. Returned and filed at ——, on the 28 day of March, 1882. Bell W. Etheridge, clerk; —— ——, D. C.

104 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its October term, A. D. 1884, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 11th day of November, A. D. 1884, in the following cause, to wit:

KELLY AND ALEXANDER, Plaintiffs,
vs.
MAYOR AND ALDERMEN OF MILAN, Defendants. } No. 20.

This cause was this day heard by the court upon the demurrer of the plaintiff to the rejoinders of the defendants to the plaintiffs' replication to their plea, and after argument it is considered by the court that the said demurrer be, and it is hereby, overruled.

And thereupon, by consent of the parties, the plaintiffs take issue upon said rejoinder without formally entering the same, except by this order.

105 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its October term, A. D. 1884, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 11th day of November, A. D. 1884, in the following cause, to wit:

KELLY AND ALEXANDER, Plaintiffs,
vs.
MAYOR AND ALDERMEN OF MILAN, Defendants. } No. 20.

This cause being heard by the court on the stipulations of the parties on file in the record and the stipulations to try without a

jury, the court is of the opinion and doth adjudge that the facts and law are with the defendants. It is therefore considered by the court that the defendants go hence without day and recover of the plaintiffs and their surety on the cost bond the cost of this suit to be taxed; for which let execution issue. The plaintiffs then moved the court for a new trial, which motion, after argument, was overruled; to which the plaintiff- then and there excepted.

106 OFFICE OF THE CLERK OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE.

I, Bell W. Etheridge, clerk of the circuit court of the United States for the eastern division of the western district of Tennessee, do hereby certify that the foregoing 105 pages contain a full, true, and perfect copy of the record and proceedings in the above-entitled cause as the same appears of record in the files of my office.

Witness my hand and the seal of said court, at office, this 19th day of January, A. D. 1885.

{ Seal Circuit Court of the United States, Western District of Tennessee, Eastern Division. }

BELL W. ETHERIDGE, *Clerk*,
By DAVID H. HAYNES, *D. C.*

107 *Opinion.*

Holmes Cummins, for plaintiffs; Sp'l Hill and Gantt & Patterson, for defendant.

Before Matthews, justice, and Hammond, J.

HAMMOND, *J.:*

When this case was first heard there had been a judgment by default against the defendant, and on motion to set it aside the parties stipulated that, on the agreed state of facts, the court should determine the whole controversy and render judgment accord-
108 ing to the facts and law of the case. There were no pleadings whatever except the declaration, and this anomalous condition of the record rendered it quite impossible to do what the parties wished, since there were no issues to which to apply the facts, and the rights of the parties might largely depend on the issues to be made by pleadings; hence the default was set aside and the parties directed to plead; this having been done, the case is again heard upon a stipulation as to the facts and by the court without a jury; but this stipulation, as it appears in the record, may not be broad enough to meet the requirements of the statute, for nowhere does it in terms say that a jury is waived. Rev. St., § 649. The parties are directed, therefore, before judgment is entered, to amend the stipulation or to file an additional one waiving a jury, as required by this section.

This court had occasion, in the case of Green *v.* Dyersburg, 2 Flippin, 477, to consider very carefully the power of municipalities in Tennessee to issue bonds like these under the general statutes re-

lied on here or any power to be implied from them or from the general municipal authority of corporations, and concluded such power does not exist. We think that decision is fully sustained by the Supreme Court of the United States and of the State of Tennessee. Claiborne Co. *v.* Brooks, 111 U. S., 400; S. C. 4 Sup. Ct. Rep., 489; Wells *v.* Supervisors, 102 U. S., 625; Pulaski *v.* Gilmore, MS. (Nashville, 1880). It is true that in this last case the court reserved any decision as to what the Legislature intended by reference to the "execution of all necessary orders, bonds, and payments in order to carry out a loan or credit," in the act of January 23, 1871, c. 50, (Tenn. Code, § 491*a*); but it is none the less true that it did distinctly decide that "there is nothing in this act that can possibly be construed, on any fair principle of construction, to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company," as authorized by the act of January 22, 1852, c. 117 (Tenn. Code, §§ 1142–1165;) and it seems to us clear enough that the purpose of the act of 1871 was to conform the laws of Tennessee, general and special, to the new constitution of 1870, by authorizing all municipalities already in possession of a legislative authority to give or lend its credit in aid of any person, company, association, or corporation, or which might thereafter become possessed of such legislative grant, to take the consent of the corporate authorities and of the qualified voters as required by the constitution, and thereafter "to make and execute all necessary orders, bonds, and payments in order to carry out such loan or credit voted for as prescribed by this act," but authorized and prescribed by some other act passed for that purpose. It was not an act to authorize all counties, cities, or towns to give or lend their credit and "execute all necessary orders, bonds, and payments in order to carry out such loan or credit," but simply one directing all counties, cities, or towns invested with that authority to take a vote of the people and
109 comply with the constitution. It was an act of regulation and not one for the creation of municipal powers. Without the aid of the well-established rule of strict construction of all acts granting this municipal power to issue bonds in aid of auxiliary enterprises, the act of 1871 presents no difficulty, except in the somewhat too general indication of its purpose; with that aid all difficulties vanish.

It affords no argument against this construction of our legislation if the fact be true, as suggested by counsel, which we do not concede, however, that it has never been the habit of the Tennessee Legislature to authorize a gift or loan of credit by corporations in any other manner than by becoming stockholders in the enterprise. This act of 1871 was a general law to enforce a constitutional provision, and in its nature was rather prospective than retrospective and *non constat* that some act may not be passed which would authorize such a method of aiding corporate enterprises. Under some circumstances the act of 1871 might apply to such an authority already given by the Legislature, if any such there be; but under all circumstances it does apply to all future grants of power of that kind, and we are not aided in the construction of the act by any inquiry whether such a

grant has ever been made or will be hereafter made by the Legislature.

On the other hand, as is well known to those informed as to our Tennessee legislation, although we have long had a system of municipal aid to railroads by stock subscriptions, the payment of which is particularly regulated by statute (Tenn. Code, §§ 1142–1165) in a manner which in no sense contemplates the issue of bonds, the parties interested have been allowed in numerous instances, like that of Tipton Co. *v.* Locomotive Works, 103 U. S., 523, to anticipate the benefits of those subscriptions by issuing bonds in payment thereof; but this has always been done by special laws that, providing for the particular scheme adopted, regulate in detail the character of the bonds to be issued, which is, on plain business principles, necessary for the protection and benefit of all concerned. The absence of such special legislation is, under the circumstances, an indication of the legislative will that a given municipality shall be governed by the general law of the code regulating its subscriptions.

Since the constitution of 1870 no such special law is allowable, and the authority can be given only by general statute. Const. 1870, art. 11, § 8; art. 2, § 29. But for like prudential considerations, based on correct business principles as well as a sound public policy for the protection of the general welfare, it is presumable that, if the Legislature intended by any general law to authorize stock subscriptions to be anticipated by the issue of bonds, thereby changing the established system provided for in the code (sections 1142–1165), it would in that general law carefully prescribe, as it has always done in the special laws having that purpose in view, the character of bonds to be issued, regulate the whole scheme with regard to its details, and not leave the people who are to pay the money by taxation to the prey of speculators and corruptionists, who may, and too often do, feed upon such enterprises, guard them as carefully as we may. Particularly would this be expected of a legislature meeting under a constitution which had curtailed its powers for this very reason of improvident legislation, as was done by the constitution of 1870. Yet all prudential features of this kind are omitted from the act of 1871, which we are asked to construe as giving to the municipal corporations of Tennessee the most unbridled power to issue bonds in payment of their stock subscriptions that are otherwise so carefully guarded by the code. We cannot do it.

Again, the constitution of Tennessee, in the very phraseology of article 2, § 29, recognizes the distinction referred to by counsel here between a credit "given or loaned to or in aid of any person," etc., and becoming "a stockholder with others in any company," etc., by taking pains to impose the same restrictions on each in separate clauses. They are in no way treated as the same thing; are not confused with each other nor joined together in any way; certainly not in the way the argument here would connect them, by relegating a stock subscription, with bonds to pay the subscription money, to the category of "giving or lending credit;" and the act of 1871, c. 50, follows the same treatment found in the constitution by keeping these two things entirely distinct. The first clause of the second

subdivision of the act relates wholly to the "giving or lending of credit;" and in this clause alone do we find the words so much relied on here as giving "full power to make and execute all necessary orders, bonds, payments," etc. It is in the second and last clause of that subdivision that we find the provision independently made for becoming a stockholder with others "upon a like election and assent of a like majority, as prescribed by this act," and in that clause there is no provision for making and executing "all necessary orders, bonds, payments," etc., though it can hardly be doubted that such power would exist where the corporation had authority under some legislative grant to issue bonds or make orders or payments for its stock subscriptions. This shows that it is an act of supplemental regulation directing an election in cases where before, and but for the constitution and this act, such an election was not required. We do not say that a power to issue bonds in payment of a stock subscription might not fall or be made to fall within a power "to give or lend credit to or in aid of any person, company," etc., but we do say that the constitution and this act of the Legislature treat the giving or lending of credit as one thing and a stock subscription as another thing, and that naturally in such a division, if kept up, as it seems here to have been done, the issuing of bonds to pay a stock subscription would fall within the latter subject, and should receive no aid by implication or construction from provisions of the statute relating to the former. It is agreed every-
111 where that the canons of strict construction in such cases forbid such liberal implications. It is only necessary implications that are ever indulged in any case—necessary in the sense of being the consequential effect of the use of the language employed, and without which implication the manifest purpose of the statute would fail. This kind of necessity is too often confounded with the necessitous circumstances of the private interests of the parties involved, which can in no sense influence a court in the interpretation of the legislative will. Dill. Mun. Corp., §§ 55, 81–90, 106; Police Jury *v.* Britton, 15 Wall., 566; Wells *v.* Supervisors, 102 U. S., 625; Claiborne Co. *v* Brooks, 111 U. S., 400; S. C. 4 Sup. Ct. Rep., 489; Milan *v.* Railroad, 11 Lea, 329, 334.

Legislative authority to support these bonds is sought to be derived from the act of March 18, 1872, c. 20, p. 44, "to authorize the mayor and board of aldermen of any incorporated city or town in the State of Tennessee, having a population of from one thousand and upwards to twenty thousand inhabitants, to issue bonds of said city or town to the amount of $15,000." The bonds here sued on are in denominations of $1,000 and bear 7 per cent. interest, payable annually, while those authorized by the act were to be "of denominations from twenty-five to five hundred dollars," and were to bear 8 per cent. interest, payable semi-annually. It was held in Milan *v.* Railroad, 11 Lea, 329, that this variation of denomination was not admissible and that the interest could not be increased. A similar ruling was made in Green *v.* Dyersburg, 2 Flippin, 477; whether the mere change of denomination and a diminution of the interest would fall within the principle of these cases or be held to

be "a beneficial modification of the requirements of the statute," the fact of this non-compliance with the statute in the issue of these bonds affords an inference that they were not in fact issued under this statute and that the resort to it is an afterthought.

The act, as a whole and in its special features, seems to have contemplated a means of paying the ordinary corporate debts of the cities and towns designated, and not such extraordinary liabilities as arise from aiding the construction of railroads. The bonds issued were to be "alone for the purpose of paying outstanding liabilities," and were not in any case "to exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuing thereof." There is nothing in this record to show that at the date of these bonds there was outstanding against the town of Milan the sum of $12,000 of "unsettled and matured" liability for stock subscriptions to the railroad company. The recitals of the bonds state the consideration to be "the location of the Mississippi Central railroad by said town," and they nowhere refer to any stock subscription whatever, or that they are in payment of the stock. On their face they indicate a direct vote of the bonds to the company without any consideration other than the location of the road. In the bill filed in the State chancery court, wherein the minutes of the town
112 proceedings are set out, there is no indication of a prior stock subscription, and complaint is made that there was none; and the first step seems to have been a vote by the board to issue the bonds and to direct an election at the polls "for a ratification or rejection of said proposition," and at the next meeting the entry is—

"The election was held on the twelfth day of June, 1872, for the ratification or rejection of the action of the board of mayor and aldermen of the town of Milan in regard to the issuance of the $12,000 in bonds to the Mississippi Central Railroad Company upon certain conditions. The returns of said election show a vote of 117 for subscription and 2 no subscription."

Now, there do not here appear to have been any proceedings for a subscription of stock and an issue of bonds to pay it, but only a "subscription" of the bonds themselves. This would seem to indicate that the town was proceeding to give its credit or sell its bonds for the sole consideration of the location of the road, and this under the first scheme mentioned in the constitution and act of 1871, and not the second, the difference between which has been heretofore adverted to; and, so far as the records of the town are said to show, this is all that was ever done, though when we come to the compromise decree in the State court the railroad agrees to issue its stock in payment of the bonds, this being the first time we hear of any stock being involved in the negotiations between the parties. Nevertheless, the parties, by their stipulation in this case, have agreed that the "bonds were issued by defendant in payment of a stock subscription made by defendant on the — day of ——, 187–, to the Mississippi Central Railroad Company." This is very indefinite, indeed, and there is nothing to show the date or other particulars of the subscription, nor whether it refers to the subscription made in the con-

sent decree of the State court or one made prior to the original action of the board, as above set forth.

If we turn, however, to the code of Tennessee (sections 1142–1165), under which alone the town could make a stock subscription, we find that the requirements of law, as therein declared, show that, if the records of the town correctly state all that was done, there could never be a more reckless disregard of those provisions; and the inference is almost irresistible that the town was not proceeding under the provisions of the code at all. It would seem, therefore, quite impossible that the very indefinite stipulation of the parties in this case could refer to such a subscription, and that it rather refers to the subscription made by the consent decree in the State court, from which it will be seen that the bonds were, by agreement, "resealed" and "redelivered" at that date, viz., December 18, 1874. This would be, then, the date which should be filled in the blanks of the stipulation of the parties as filed in this court. When so filled up it is apparent that the town was not acting under the above-cited provisions of the code, and that the plaintiffs can receive no aid from those provisions, but must stand by the
113 contract as they made it on December 18, 1874. The inevitable result would be that the town, in making that contract for stock subscription, was acting without legislative authority, and the debt for it was void. Wherefore it could not, even under the powers granted by the act of 1872, lawfully issue bonds to pay it, since the act, in terms, by section 2, restrained the issuance to holders of *bona fide* claims against the town, to say nothing of any other restriction of law on the subject.

But if it be conceded that the stipulation refers to some other stock subscription than that of December 18, 1874, as above mentioned, and one made prior and as preliminary to the original delivery of the bonds on July 1, 1873—as, perhaps, the seventh section in its last clause intends to agree was the case—that the town proceeded strictly under the code in making that subscription, and under the act of 1872 in issuing the bonds, still it appears conclusively by section 1154 of the code that "not more than thirty-three and one-third per cent. of the stock subscribed as above can be collected in any one year," and at most only one-third of the $12,000 subscription could have been at the date of the bonds an "unsettled and matured liability or debt." What is to be held to be the effect of this overissue we will not now inquire, for beyond all this there is a more fatal objection to the claim of power under the act of 1872, and we have taken the pains to point out these irregularities and glaring departures from the code and the act of 1872 more to show how regardless this transaction was of the very statutes now relied on to support it than to predicate our judgment upon them; and here we may remark, in reply to the argument that the town has received the consideration in its railroad facilities, that if its stock subscription be valid under the code the remedy of the plaintiffs would be to proceed under the code, to compel the collection of the tax to pay for the stock, and not to enforce bonds issued without legislative authority. No matter what the benefits received, all par-

ties dealing with the town knew that it could not bind itself without legislative authority, and only in the manner so allowed.

The agreed statement of facts in this case leaves only one question of fact open for our determination, and that is whether the town of Milan had, at the time of the issue, the requisite "one thousand or more inhabitants" to bring it within this act of 1872. The learned counsel for plaintiffs frankly admits in his brief "that if we are to look to the proof in the record on that point, defendant's population is proven to have been under that limit," and we find the fact to be so. This would end all claim for power to issue these bonds under that statute, but it is insisted that defendant is estopped by the recitals in the bonds from denying that its population was sufficient to authorize the town to issue them. The bonds do not recite that the town had any given number of inhabitants, but only that they are issued "in pursuance of the laws of Tennessee;" that the people "voted the same by a majority, and in the form
114 required by law, the vote being in pursuance of due notice, and in all respects in accordance with the laws of Tennessee;" and that the board acted "in pursuance of the authority given by the people thereof, and in obedience to the duty required of them."

Under the well-established rules of decision on this subject these recitals are all sufficient to estop the town as against a *bona fide* holder for value from denying the fact of the sufficiency of population, and would be a plenary municipal decision of that fact if the town authorities were vested with power to decide the question. Wilson *v.* Salamanca, 99 U. S., 499; Coloma *v.* Eaves, 92 U. S., 484; Marcy *v.* Oswego, *id.*, 637; Buchanan *v.* Littlefield, 102 U. S., 278. There are many other cases to which these will be a guide. But the cases are carefully reviewed in the recent one of Northern Nat. Bank *v.* Trustees Porter T'p, 110 U., 608 (S. C. 4 Sup. C't Rep., 254), and the rule is there laid down that this estoppel only operates when the duty of ascertaining the fact has been developed by law upon the municipal or other authority which undertakes to determine it by the recital. The authority may be conferred by special legislation in the act authorizing the bonds, or elsewhere, or may grow out of the ordinary duties imposed by law upon the particular officers or agents. Now, there is not one word in this act of 1872 imposing the duty of ascertaining the population on the board of mayor and aldermen of the towns and cities referred to in the act, nor any provisions from which such a duty on their part may be fairly inferred. The "consent of three-fourths of the qualified voters voting at an election to be held for that purpose under the supervision of said mayor and aldermen" is provided for, but this does not by any fair implication confer the power to take a census of the inhabitants. There is no general or special act of the Legislature requiring these or any officers of our municipalities or of the State to take a census or keep a record of any enumeration of their respective inhabitants. Generally, when our acts refer to population and direct its ascertainment they refer in terms to the Federal census as the guide, and we have no law or practice of having municipalities discharge this duty. To do this is not a necessary duty growing out of general municipal

power. Each municipality may act as it pleases in this regard. There was, then, no duty devolved on this board to ascertain or determine the fact of population, and their determination of it cannot be implied from the recitals in the bonds. It was a matter *in pais*, as much open to the payee of the bonds at the time of the contract and since to the holders of them as to others to decide for themselves. There is no pretense of any authority in the charter of the town or of the railroad company or in any other act than those already considered to support these bonds, and they were and are utterly void for want of legislative power. Ottawa *v.* Carey, 108 U. S., 110; S. C. 2 Sup. C't Rep., 361; Lewis *v.* Shreveport, *Id.*, 282; S. C. 2 Sup. C't Rep., 634.

115 The next question which demands our attention is that arising out of the proceeding in the State chancery court, which is pleaded as *res adjudicata*. If this be a good plea we have the anomaly of a municipal corporation issuing bonds without legislative authority making those bonds valid by an equally void agreement of its agents that they shall be so. We held in this court, the same judges sitting as in this case, in Norton *v.* Shelby Co. (not reported), that bonds issued by usurping corporate officials which were void could not, for want of compliance with the constitutional and statutory prerequisite of an election by the people, be ratified by the corporate action of the rightful officials after their restoration, a ruling which was supported by decisions of the Supreme Court before and since. Marsh *v.* Fulton Co., 10 Wall., 677; Lewis *v.* Shreveport, 108 U. S., 282; S. C. 2 Sup. C't Rep., 634; Ottawa *v.* Cary, *id.*, 110; S. C. 2 Sup. C't Rep., 361. It was said by the Supreme Court in Northern Nat. Bank *v.* Trustees Porter T'p, 110 U. S., 608; S. C. 4 Sup. C't Rep., 254, speaking of an estoppel by recitals, that it did not go to the extent of precluding an inquiry into legislative authority to issue the bonds, and it certainly must be said of any contract of ratification that, when pleaded as an estoppel *qua* contract, it cannot prevent an inquiry into legislative authority to issue the bonds. Does it receive any additional force when the contract of ratification has been made the basis of a judicial decree which in terms declares the bonds to be valid only because the parties have agreed that they shall be valid? It must be admitted that when in a court of competent jurisdiction, and without collusion or fraud, there has been a decree *in invitum* pronouncing, directly or by implication from the adjudication, that there was legislative authority to issue the bonds, that decree estops the parties from thereafter denying the authority. And we may go further and, for the argument, admit that if that decree be pronounced upon an agreed statement of facts like that upon which we are now deciding this case, for example, the estoppel is equally as effective as if the facts were determined by the formal verdict of a jury or the judgment of a court upon the proof heard at the trial.

Judgments could not be so rendered at common law where the admission must be strictly one of record as by demurrer, default, confession, *retraxit*, or the like. Hence the necessity of such statutes as we have in Tennessee, permitting the parties to submit an agreed

case to the decision of a court. Tenn. Code, §§ 3450, 3454, 4229, 4497. And, in the absence of a statute, such practice has been established by general usage. Derby *v.* Jaques, 1 Cliff., 425. From a judgment of this kind it was at first thought there could be no writ of error, but it was later decided otherwise. *Id.;* Stimpson *v.* Railroad, 10 How., 329. Similarly in a court of equity it was always the rule that parties by themselves, or counsel, might agree upon a decree, and it was irreversible and could not be appealed. 2 Daniell, Ch. Pr. (1st Ed.), 616, 619, 668; *id.* (5th Ed.), 973, 1453, and
116 notes; Bradish *v.* Gee, 1 Amb., 229; French *v.* Shotwell, 5 Johns. Ch., 555; Ketchum *v.* Farmer's Trust Co., 4 McLean, 2; Musgrove *v.* Lusk, 2 Tenn. Ch., 576; Williams *v.* Neil, 4 Heisk., 279; Ragsdale *v.* Gossett, 2 Lea., 729; Jones *v.* McKenna, 4 Lea., 630.

But, obviously, it does not follow from this binding force of the decree that it can be always pleaded as *res adjudicata.* That depends upon other circumstances than its mere binding effect as a decree in the court where it is rendered. For example, a judgment of nonsuit or a bill dismissed by plaintiff, or for want of jurisdiction, cannot be pleaded as *res adjudicata,* because not a decision on the merits, while a judgment on demurrer, which is a decision of the court on facts admitted or a bill dismissed for want of equity, or upon determination of the court in favor of defendant can be so pleaded. Homer *v.* Brown, 16 How., 354; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S., 121; S. C. 3 Sup. Ct. Rep., 99; Gould *v.* Evansville, 91 U. S., 526; Durant *v.* Essex Co., 7 Wall., 107; Badger *v.* Badger, 1 Cliff., 237; Mabry *v.* Churchwell, 1 Lea, 416; Bankhead *v.* Alloway, 1 Tenn. Ch., 207.

So, in a case like the one we are now trying, again using it as an example, it is plain that the parties have used the agreed statement of facts as a convenient mode of placing the court in the possession of the facts without producing the evidence on which they would be otherwise ascertained; but they have left the decision of the rights of the parties growing out of those facts to the court and have not by consent of parties determined, by themselves and for themselves, what those rights are. That which they have done is very like what they do when by a demurrer they admit the facts and the court decides the case, or when by a *retraxit* they confess the facts and the court directs a judgment. What they have not done is more like that which they do when they take a nonsuit or voluntarily dismiss their bill.

In the language of the case of the Manhattan L. Ins. Co. *v.* Broughton, 109 U. S., 125; S. C. 3 Sup. Ct. Rep., 99, "a trial upon which nothing was determined cannot support a plea of *res adjudicata* or have any weight as evidence at another trial," and, as decided in Russell *v.* Place, 94 U. S., 606, if it appear by the record or *aliunde* that the matter was not litigated and decided there could be no estoppel. Now, does it not appear by what the parties actually did in the State chancery court that this matter was not litigated and not decided? And here lies a distinction that must not be overlooked in cases like this between a consent to submit a case to

the court for its decision and a consent as to what the decision shall be. Again, there is a distinction between that estoppel which the parties put upon themselves by their agreement, which may be pleaded and bind them as an estoppel *in pais* and that which arises out of the adjudication as an estoppel of record. The agreement is none the less an estoppel because it takes the form of a judicial decree, but not necessarily does it operate as an estoppel of
117 record. The pleas respectively setting them up would be essentially different. 2 Daniell, Ch. Pr. (1st Ed.), 175, 187; *id.* (5th Ed.), 659, 666. In both the record would be used as evidence; in one case conclusive in its effect to support the plea of *res adjudicata;* in the other it would not be conclusive, might be averred against, and would be overcome by countervailing proof of sufficient force.

The text writers agree that in England a consent decree cannot be pleaded as *res adjudicata*, and is effective when pleaded only so far as the estoppel arises out of the agreement itself. Bigelow, Estop., 17; Freem. Judgm., § 331; Whart. Ev., § 783. They say, however, that the decisions of the American States, generally, are against this doctrine. *Id.*, Wells, *Res. Adj.*, §§ 440–460. We have examined very carefully a great many of the cases cited in support of this supposed distinction between the American and English courts and find that if critical attention is given to the distinctions to which we have already adverted between a case decided by the court upon an admitted state of facts and one decided by the parties themselves solely by their own consent, which the court admits of record by registering the agreement, and between the estoppel of the agreement and that of the judgment, and to distinctions arising out of local statutes regulating the subject of judgments by confession and agreed cases, it may be doubtful if there be so much divergence between those courts on this subject.

To illustrate: In Merritt *v.* Campbell, 47 Cal., 543, a dismissal by consent under the local statute was held equivalent to a judgment upon *retraxit* at common law, and was a decision on the merits under the act, because, like a *retraxit*, it was "an open and voluntary renunciation of the suit in court." In Ellis *v.* Mills, 28 Tex., 584, it does not appear whether it was the compromise agreement which was a bar as a matter of evidence or the judgment as a matter of record. In Fletcher *v.* Holmes, 25 Ind., 458, there was an agreement for a judgment not otherwise supported by the complaint, but it was not a plea of *res adjudicata* at all. Gates *v.* Preston, 41 N. Y., 113, is more in point, but there was a divided court. In Bank *v.* Hopkins, 2 Dana, 395, there was in effect a decision on an agreed statement of facts. And so we might go through the cases and distinguish them; but it is not necessary, for we have not found one where a municipal corporation has been held to have validated its bonds, otherwise void, by a consent decree declaring the bonds valid and showing on its face that it was so decreed solely because the parties had agreed to it.

Individuals *sui juris* may agree to almost anything and bind themselves, but corporations must act within their delegated powers.

It is undoubtedly within their power to compromise litigation, and they may, when sued, consent to orders and decrees, and if the subject-matter of the suit be within their authority this consent will bind as it will individuals. As in Board Liquidation *v.* Louisville & N. R. Co., 109 U. S., 221; S. C. 3 Sup. Ct. Rep., 144, it was
118 held that the city authorities had "under the statutes of the State" the power to compromise a suit relating to certain property belonging to the city, and in Hillsborough *v.* Nichols, 46 N. H. 379, the suit compromised was one for injuries by a defective highway, which the authorities had a right to compromise, the subject-matter being within corporate jurisdiction. In this last suit, so much relied on here and cited by the text writers above named, it is to be noted that there was no plea of *res adjudicata* at all, but it was an action by the town to recover money paid to the plaintiff under the compromise judgment. We cannot say that if the plaintiff in that suit had brought another action for the injuries, the former judgment by consent would have been held to sustain a plea of *res adjudicata*. These compromise judgments may be binding in other respects, but not necessarily for that reason pleadable as *res adjudicata*. Whether they are binding in other respects depends on the circumstances of the case; but whether they are binding on a plea of *res adjudicata* depends on whether the judgment or decree conforms to the rules of law which give it that effect. In Lamb *v.* Gatlin, 2 Dev. & B. Eq., 37, an exception to the report of a master equivalent to the plea of *res adjudicata* failed, because the former decree "was not in truth a decree rendered *in invitum* and by judgment of the court to which defendant was compelled to submit, and which, therefore, not only binds him but those for whose benefit he held the estate, unless it can be impeached for fraud, but it was a voluntary settlement, etc. A decree thus rendered has no force except so far as seen to be just."

In Allen *v.* Richardson, 9 Rich. Eq., 53, it is said: "A consent decree is the mere agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement." In Rosse *v.* Rust, 4 Johns. Ch., 300, where a bill had been dismissed on a former hearing because no one appeared for the plaintiff, the decree was pleaded as *res adjudicata*, and Chancellor Kent said that to be a bar the merits must be decided, and where the merits were never discussed and no opinion of the court ever expressed upon them, the case does not come within the rule. He was overruled in Ogsbury *v.* La Farge, 2 N. Y., 113, not upon the principle thus enunciated, but in his application of it, and it was held that a bill so dismissed after publication of proof was the same as a decision on the merits and not like a voluntary dismissal or a nonsuit at law. But it must be admitted that in French *v.* Shotwell, 5 Johns. Ch., 555; S. C. 6 Johns. Ch., 235; S. C. 20 Johns., 668, that learned chancellor does decide that a decree by consent dismissing the bill may be pleaded in bar to another bill for the same relief, though, in that case, the agreement itself was likewise pleaded as an estoppel, and, without the decree would have been just as effectual as with it; for, if the plaintiff had not dismissed the bill according to the agreement the defendant, by proper pleading, even in that suit, might have called upon the court to dismiss it

In fact, the agreement settled the merits of the controversy,
119 the parties being competent to agree; and the plaintiff, having waived the fraud and expunged the usury, there was nothing to do but dismiss the bill, and all other bills setting up that fraud and usury. All the authorities agree that if the plaintiff had voluntarily dismissed his bill he might have brought another suit. He did voluntarily dismiss it, but upon a valid agreement to do so; and from this it would seem that it was the agreement at last that worked the estoppel. But the chancellor did not put his judgment on this ground, and the case is a very strong one for the plaintiffs here unless there be a distinction to be taken on the want of power in the corporate authorities of Milan to make the agreement. The case seems to have been affirmed; but it is said in Shufelt *v.* Shufelt, 9 Paige, 137, not on that point, though the chancellor there followed it as to a confessed judgment. The cases cited by Chancellor Kent are not all of them cases of pleas of *res adjudicata*, those at page 565 being applications for relief on *sci. fa.*, or direct applications to vacate the judgments, while Loyd *v.* Mensell, 2 P. Wms., 73, and Wishall *v.* Short, 2 Eng. Cas. Abr., 177, were original bills to impeach the judgments for fraud, and it was held that the judgments might, in that kind of suit, be pleaded in defense if accompanied by an answer denying the fraud. In Baird *v.* Berdwell, 60 Miss., 164, the case establishes that where it is shown by the decree that it was not heard upon its merits there is no bar to another suit. It was a bill dismissed on motion of defendant for want of prosecution after the case had been set down for final hearing. In Pelton *v.* Mott, 11 Vt., 148, there was an agreement to dismiss on the merits, which being done it was held to be a bar; and Hicks *v.* Alysworth, 13 R. I., 562, was a similar case. The parties, by their agreement in those cases, intended to provide against the distinction between a voluntary dismissal, or a dismissal for want of prosecution, and an adjudication on the merits. In Rollins *v.* Henry, 84 N. C., 569, 578, the action of the court was more like that in this case than any we have found, except that in that case the decree followed the technical result of the agreement, which settled the rights of the parties and formally dismissed the bill, while in this the bill was not technically dismissed, but was retained only so far as necessary to enforce the final execution of the decree. Substantially the bill was dismissed as in the North Carolina case, in which it was held that the decree could not be relied on as *res adjudicata* because "it does not appear that the merits of the dismissed proceeding were considered and passed on; and the mere dismissal of the case is not, in our opinion, followed by the consequences supposed." The case cited by the court calls attention to the fact that in equity courts to "dismiss the bill" is the entry whether the case is heard on the merits and decided for defendants, or otherwise dismissed, while in courts of law the form of the entry shows for itself whether it was a mere discontinuance or a judgment on the merits. Jenkins *v.* Johnson, 4 Jones Eq.,
120 149. Hence, in courts of equity, we must have a care to find whether the decree was indeed an adjudication *in invitum* or only the agreement of the parties to act voluntarily.

In Massachusetts the rule seems to be that where issue is joined a decree by consent on that issue is a bar, but where no issue is joined, as where a plea in abatement has been sustained after which there was a consent judgment, it is no bar. Powers *v.* Chelsea Bank, 129 Mass., 44; Jordan *v.* Siefert, 126 Mass., 25. Now, in the case we have in hand there was never any issue joined. After the demurrer was overruled the plaintiffs had a right to an answer from the defendants, and, failing in this, to a decree *pro confesso*, and ultimately a decree in their favor. Technically, overruling the demurrer was a decision in favor of the bill and an adjudication that the bonds were void, but by agreement of the parties this result was defeated by declaring the bonds valid, dissolving the injunction, and substantially dismissing the bill. There could be no decision on the merits, for there was no issue on the merits. The demurrer may have made an issue, but that was overruled, and this was a decision against the plaintiffs and not in their favor. This is an anomaly in this class of cases, but it would be stretching the doctrine of this estoppel very far to allow the plaintiffs, in the face of an overruled demurrer, to have the benefit of a decree as if their demurrer had been sustained upon the issues made by it and thereby deciding the merits. Gilman *v.* Rives, 10 Pet., 298, 301; Aurora *v.* West, 7 Wall., 82, 99; Gould *v.* Evansville Railroad, 91 U. S., 526.

The best that can be said for the plaintiffs, after this demurrer was overruled, is that upon a naked bill, without any issues of any kind or any pleading by defendant, the parties agreed to dismiss it (though the decree does not in fact dismiss it) upon a stipulation that the facts and law were with the defendants. The declaration by the court that the bonds were valid adds no force to the decree, which should have been simply that the bill be dismissed, if the court so decided. All the authorities, as we have shown, agree that such a decree is not a bar unless it be a decision on the merits, and the inquiry is always to see whether it is such a dismissal or one otherwise procured. Here the bill was dismissed after a decision of the only issue in the case made by the demurrer, in favor of the plaintiffs, that the bonds were void. Technically, then, it seems the decree cannot be a bar except upon the theory of a purely consent arrangement to dismiss a bill, before answer filed, by an adjudication without issues, shown upon the face of it to be not the judgment of the court, but the judgment of the parties as to their own rights.

In Jenkins *v.* Robertson, H. L. 1 Sc., 117, there was a suit by a town for a right of way for foot passengers. The town had a verdict, but afterwards abandoned it and agreed to a judgment absolving the defendants and to pay the costs and expenses, and the court so declared. That was a case precisely like this, except that the subject-matter was clearly within the power of the municipality
121 to arrange. Nevertheless, the House of Lords held that a decree so procured by consent was not a bar to a new action by the town, and reversed a decree below to the contrary. It was announced in the most emphatic terms that the law of England and Scotland was that a decree so pronounced could not be *res adjudicata* except so far as an estoppel could grow out of the agreement; and

in the Earl of Bandon *v.* Becher, 3 Clark & F., 479, 509, the same court approved the statement of the doctrine, as made by the solicitor general in the Duchess of Kingston's Case, 20 How. St. Tr., 478, that such decrees may be attacked when so pleaded for collusion or fraud, because there is no real prosecution, no real defense, and no real decision.

In a case like that we are considering an agreement that would impose, without legislative authority, a tax upon the citizens of the municipality to pay bonds that were void is itself a fraud, no matter how well intentioned or how much the parties believed in their power to make it. After the agreement was made it was a collusive suit and a collusive decree to all intents and purposes, and it is a mistake to suppose that there should have been a corrupt bargain by which the persons acting for the town profited themselves to invoke this principle of fraud and collusion. Its effects are the same, and it was none the less fraudulent in contemplation of law, because the parties got nothing for the wrong or thought they were doing right. Ensminger *v.* Powers, 108 U. S., 292, 301; S. C. 2 Sup. Ct. Rep., 643. Objection is made that the decree of a State court pleaded as an estoppel cannot be attacked in this court for fraud in procuring it. Christmas *v.* Russell, 5 Wall., 290. But this does not apply when the infirmity appears in the record and on the face of the decree itself, as it does here. It is then a question of the character of the judgment itself in its relation to the conduct of the parties procuring it. It is not attacking the judgment for fraud and collusion, but the presentation by the plaintiffs themselves of a record which recites the collusive arrangement and makes it *felo de se* as between the parties to it. They had no power to issue bonds, assumed to supply it by contract between themselves, and sought to sanction that assumption by a judicial decree. They might as well, without a suit, have taken a judicial decree in the form of an act of the Legislature and in lieu of it. Indeed, such a decree is a usurpation of legislative power when it undertakes to declare by mere consent of parties the validity of the bonds. If the Legislature had especially invested the courts with power to make such declarations, and thereby make valid bonds that were void by want of legislative authority, it would be unconstitutional as a delegation of legislative power. Jones *v.* Perry, 10 Yerg., 59; Cooley Const. Lim., 87–114, 392.

The Supreme Court of the United States, in Gaines *v.* Relf, 12 How., 472, 537, decides with emphasis that a collusive suit cannot be *res adjudicata*, because there is not a real controversy really litigated. That was, in principle, a case like this, only the
122 agreement did not appear on the face of the decree, as it does here. It was throughout a consent judgment, and we regard the case as quite applicable here. So is the case of Gay *v.* Parpart, 106 U. S., 679, S. C. 1 Sup. Ct. Rep., 456, where a decree that was merely "the judicially recorded supposed agreement" of the parties was not allowed to stand in the way of doing justice between them; and in Ensminger *v.* Powers, 108 U. S., 292, S. C. 2 Sup. Ct. Rep., 643—a very remarkable case—the court denied effect to a plea of *res adjudicata* on a bill of review, because the decree pleaded was

not the "deliberate judgment of the court upon the facts in the record," and "the functions of the judge were abdicated," etc. It is a very instructive case.

The most that can be said is that the authorities are conflicting on the question whether purely consent decrees are *res adjudicata;* but certainly we should not be asked to give this decree greater effect than it would have in the State courts of Tennessee, where the supreme court, in the case of Hix *v.* Gosling, 1 Lea, 560, has in terms adopted the English doctrine. Rice *v.* Alley, 1 Sneed, 52; Penniman *v.* Smith, 5 Lea, 130.

We do not wish to be understood as ruling that a record is not to be taken for all that it implies when pleaded as *res adjudicata* or that the trial of that plea will require an inquiry into the extent of the litigiousness of the parties or the quality and quantity of consideration given to the case by the court rendering the decree, or whether its action was based on a formal or informal presentation of the facts and law, but only that the technical character of the judgment must be such that, necessarily, there was an adjudication of the merits by the court, invoked or sustained, it may be by consent of parties, but none the less an adjudication and not simply a judicial registration of an agreement of the parties; and while a consent decree upon agreement as to the facts and possibly as to the law of a case may, under some circumstances and as to some parties, have all the force and as effectually estop the parties as would a decree *in invitum*, it is not, in our opinion, competent for the authorities of a town to agree that its void bonds shall be made valid by putting that agreement into the form of a judicial decree, which, on the face of it, shows that it is not the judgment of the court upon the facts and law of a case actually litigated, but merely the record of an agreement of the parties that it shall have that effect, the authorities of the town assuming to act without legislative authority to ratify the bonds in that or any other manner.

It would be a dangerous rule if it were otherwise and afford opportunities to impose fraudulent bonds upon communities with more facility than could be done under any device hitherto resorted to by those anxious to evade the restrictions of law on that power.

Judgment for defendant.

Matthews, justice, concurred fully in the reasoning and conclusion of the foregoing opinion.

123 UNITED STATES OF AMERICA,
Western District of Tennessee:

I, Bell W. Etheridge, clerk of the circuit court of the United States for the eastern division of the western district of Tennessee, do hereby certify that the foregoing is a full, true, and perfect copy of the opinion of the court delivered in the case of Kelly and Alexander *vs.* The Town of Milan.

Witness my hand — seal of said court, at office, in Jackson, this Sept. 29th, 1885.

{ Seal Circuit Court of the United States, Western District of Tennessee, Eastern Division. }

BELL W. ETHERIDGE, *Clerk*,
By D. H. HAYNES, *D. C.*

124 In the Supreme Court of the United States.

KELLEY and Another *vs.* THE TOWN OF MILAN.

In this case, it appearing that in making up the record on the appeal from the circuit court the opinion of the court, of which a certified copy is hereto attached and made a part of this stipulation, was omitted from such record and so is not in the record on file in this court, *and* the parties, desiring to cure this omission, hereby agree that the clerk shall, in making up and printing this record, insert said opinion as hereto attached therein the same as though said opinion had been copied into the record by the clerk of the circuit court when certifying the same.

HOLMES CUMMINS,
Att'y for Appellants.
SPL. HILL,
Att'y for Defendants.

125 [Endorsed:] Supreme Court of the U. S. 1885, October term. No. 206. Kelley & Alexander pl'ffs in error, *vs.* The Mayor & Aldermen of the Town of Milan. Stipulation of counsel & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Oct. 16, 1885. James H. McKenney, clerk.

Endorsed on cover: W. Tennessee C. C. U. S. No. 206. Kelley & Alexander, plaintiffs in error, *vs.* The Mayor and Aldermen of the Town of Milan. Filed 23d February, 1885.

Assignment of Errors.

In the Supreme Court of the United States. October Term, 1887.

KELLY & ALEXANDER, Plaintiffs in Error,
versus
THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN. } No. 206.

First. The court erred in sustaining the objection of defendant in error to the offer in evidence by the plaintiffs in error of the coupons sued on and in excluding said bonds and coupons.

Second. The court erred in sustaining the objection of defendant in error to the offer in evidence by the plaintiffs in error of the record of the chancery court at Humboldt and in excluding said record.

Third. The court erred in its opinion and judgment that said bonds and coupons were not binding obligations on the defendant in error, and that it was not estopped from denying such liability because of the formal adjudication in said chancery court.

Fourth. The court erred in overruling the demurrers of plaintiffs in error to the pleas or rejoinder of defendant in error to plaintiffs' replication of former adjudication and estoppel.

In this cause, it appearing from the print of transcript that the foregoing assignment of errors has been lost or mislaid, it is agreed between counsel of both parties that the foregoing assignment of errors may now be filed and put in the record as though the same had been originally done.

SPL. HILL,
Att'y for Def'ts in Error.
HOLMER CUMMINS,
Att'y for Pl'tffs in Error.

[Endorsed:] Sup. Court U. S. Oct'r Term. No. 206. Kelley & Alexander, pl'ffs in error, *vs.* The Mayor, &c., of Town of Milan. Assignment of errors and consent of appellees' counsel to file same.

[Stamped:] Office Supreme Court U. S. Filed Jan. 27, 1888. James H. McKinney, clerk.

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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1887.

KELLY & ALEXANDER, *Plaintiffs in Error*,

vs. } No. 206.

THE MAYOR & ALDERMEN OF THE TOWN OF MILAN, *Defendants in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

HOLMES CUMMINS, Attorney.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

Supreme Court of United States.

OCTOBER TERM, 1887.

KELLY & ALEXANDER, *Plaintiffs in Error*,

vs. } No. 206

THE MAYOR & ALDERMEN OF THE TOWN OF MILAN, *Defendants in Error.*

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1. The court erred in sustaining the objection of the defendant in error to the offer in evidence by the plaintiffs in error of the coupons sued on, and in excluding said bonds and coupons.

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3. The court erred in its opinion and judgment that said coupons and bonds were not binding obligations on defendant in error, and that it was not estopped from denying such liability because of the former adjudication in the State chancery court.

4. The court erred in overruling the demurrer of plaintiffs in error to the pleas or rejoinder of defendants in error to plaintiffs' replication of former adjudication and estoppel.

In this cause, it appearing from the print of the record that the foregoing assignment of errors has been lost or

mislaid, it is agreed between counsel of both parties that the foregoing assignment of errors may now be filed and put in the record as though the same had been originally done.

SP'L HILL,
Attorney for Defendants in Error.

HOLMES CUMMINS,
Attorney for Plaintiffs in Error.

Supreme Court of United States.

OCTOBER TERM, 1887.

KELLY & ALEXANDER, *Plaintiffs in Error*,

vs. } No. 206.

THE MAYOR & ALDERMEN OF THE TOWN OF MILAN, *Defendants in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

HOLMES CUMMINS, Attorney.

STATEMENT.

In the year A. D. 1872, the defendant in error subscribed $12,000 to the capital stock of the Mississippi Central Railroad Company,[1] and, in July, A. D. 1873, in payment of such subscription issued its twelve bonds, each for the sum of $1,000, payable to said company or bearer, at twenty years, with coupons attached for annual interest thereon at the rate of seven per cent.

The plaintiffs in error are the owners of said bonds and coupons, having purchased same for value and before maturity.[2]

In July, A. D. 1874, the defendant in error filed its bill in the chancery court of Tennessee against said company and others, alleged to be holders of said bonds, for the purpose of having them adjudged invalid, both because of irregularities about said stock subscription and the issuance of the bonds, and for the alleged want of legislative authority in the town to issue such bonds.[3] In January, A. D. 1875, a decree was rendered in said chancery court

1 Record pages 3–19.

2 Record pages 11–25.

3 Record pages 4–5–20–21–22–23.

in that cause, *upon the consent and agreement of the parties*, in which said bonds were adjudged valid and binding obligations of the town, the defendant in error, and stock was to be issued the town in another railroad company into which the original payee of said subscription had been merged by a consolidation,[4] and defendant in error was again to attach its seal to said bonds and again deliver same to their then owner.

After this decree, and in good faith for value paid, the plaintiffs purchased said bonds.[5]

The defendant in error failing to pay coupons of said bonds, this suit was begun to enforce payment, when defense is rested on alleged want of legislative anthority for the town to issue such bonds,[6] and notwithstanding the former adjudication in the State chancery court and its estoppel against defendant in error, this defense is sustained by the circuit court.[7]

The errors assigned are: 1. That the court erred in sustaining the objection of defendant in error to the offer in evidence by the plaintiffs in error of the coupons sued on, and in excluding said bonds and coupons. 2. That the court erred in sustaining the objection of defendant in error to the offer in evidence by the plaintiffs in error of the record of the chancery court at Humboldt, and in excluding said record. 3. That the court erred in its opinion and judgment that said coupons and bonds were not binding obligations on defendant in error, and that it was not estopped from denying such liability because of the former adjudication in the State chancery court. And 4. That the court erred in overruling the demurrers of plaintiffs in error to the pleas or rejoinder of defendants in error to plaintiffs' replication of former adjudication and estoppel.

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4 Record pages 10–24–25.
5 Record pages 11–25.
6 Record pages 12–13.
7 Record pages 12–13.

BRIEF.

I.

The debt sought to be enforced against defendant in error is for interest on certain bonds issued by it in payment of a stock subscription made by defendant in error to the Mississippi Central Railroad Company, in aid of that company's extension of its line from Jackson, Tennessee, through the town of Milan, to Cairo, Illinois.

As shown by the record,[8] the defendant was solicitous to have this railroad extension pass through its borders, and made said subscription to secure that result. The line of railroad was built according to the wish of the town in A. D. 1873,[9] and the people thereof have now for more than fourteen years enjoyed all the benefits and advantages for which they contracted in said stock subscription.

In the popular vote on the question of authorizing said subscription less than two per cent. (only two persons) opposed such action.[10] However, if we may judge from their affidavits in the record,[11] those people were hardly so unanimous then for incurring this debt, as they are now for repudiating it.

The plaintiffs in error are the owners of said bonds and coupons, having purchased same for value, before maturity, though after the decree in the State chancery court adjudging their validity had been rendered.[12]

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8 Record pages 6–21.
9 Record pages 3–19.
10 Record pages 6–21.
11 Record pages 26–27–28.
12 Record pages 11–25.

"Under these circumstances,"
said this court through Mr. Justice Woods,[13]
"where a suit is brought on them by a bona fide holder for full value, as found by the circuit court to be the case here, some substantial defense must be set up by the county before it can escape liability."

The defense made by defendant in error is a want of power to issue negotiable bonds—and this is done under the plea of *non est factum*.[14]

To this plea plaintiffs in error, beside taking issue thereon, replied the former adjudication of the decree of the State chancery court, which they pleaded as an estoppel; and defendant in error rejoined that such decree was procured through fraud and that it had no power to consent thereto, said decree as shown on its face being a consent decree.

The plaintiffs in error demurred to these rejoinders—that defendant in error having been a party to said decree cannot in this proceeding aver such fraud against it, and that it is concluded by its consent, so evidenced, just as any other suitor would be.[15]

II.

The Legislature of Tennessee has expressly authorized counties, incorporated towns and cities to subscribe for stock in railroads running to or contiguous thereto.[16] Prior to the passage of this general statute in 1852, certain cities, etc., had been specially authorized to so act, and since A. D. 1848, it has been a settled rule in that State that municipal corporations, having legislative authority therefor, might take stock in a railroad company running to, from or through such municipality; as well as that the building of such a road is a legitimate corporate purpose of a municipal corporation, for which it might issue its bonds for the

13 County of Clay v. Society for Savings, 104 U. S. 579.
14 Record page 16.
15 Record page 16.
16 Code of Tennessee, sec. 1142 *et seq.*, Appendix.

amount subscribed, and levy taxes for the payment of the bonds and interest.[17]

Prior to the adoption of the Constitution of A. D. 1870, such subscription might be made without the approval of a popular vote, and by the action of the Mayor and Aldermen of town or city alone,[18] or that of a county by the action of the county court with no submission to or approval by the voters of the county.[19]

This rule was first announced by this court.[20] In the earlier cases in Tennessee on this subject, no question seems to have been made on the power to issue bonds in payment of such subscriptions to the stock of railroad companies, although bonds were issued in each case. These subscriptions were contested for various irregularities, non-compliance with conditions precedent, and because not a corporate purpose. However, in A. D. 1880, in an unreported opinion;[21] the court of Tennessee held that express power to issue such bonds must be found in order to hold the municipality bound thereon. This decision has been followed in a later case against defendant in error on a subscription to another railroad company.[22]

Authority from the Legislature to the defendant in error to issue the bonds in controversy in this case, seems to be granted in two statutes, which are printed in the note or appendix to this brief, neither of which were referred to or relied upon in the decision last mentioned, though in the case of Pulaski v. Gilmore, *supra*, it is denied that one of said statutes—the act January, 1871—has such meaning or effect.

17 Nichol v. Nashville, 9 Hum. 251.
R. R. Co. v. Davidson Co., 1 Sneed 637.
18 McCallie v. Chattanooga, 3 Head 317.
19 Lauderdale Co. v. Fargason, 7 Lea 153.
20 Tipton County v. Locomotive Works, 103 U. S. 523.
21 M. & A. of Pulaski v. Gilmore, Appendix.
22 R. R. Co. v. Milan, 11 Lea 329.

This statute of January, 1871, passed for the purpose of carrying into effect that provision of the Constitution of 1870, which prohibited such subscriptions except on the approval of three-fourths of the voters of the municipality,[23] expressly provides that "*if the assent of three-fourths of the voters of such county, city or town is had, then the county court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders,* BONDS *and payments, in order to carry out such loan or credit, voted as prescribed in this act,*" etc.

Under section 1160 of the Tennessee Code, printed in the appendix hereto, power is conferred to anticipate yearly tax levies, for the three years' time prescribed for payment of such subscriptions, and interest bearing warrants were to be issued for that purpose; but here, under the act of 1871, the General Assembly is providing for "*loan*" of municipal aid or voting its "*credit*" in subscriptions for stock in such internal improvement companies. The words "loan" and "credit" are not used in the same sense, they are separated by the disjunctive *or;* and the power is conferred to execute necessary orders, bonds and payments, to carry out the loan or credit so voted for stock in the railroad company. If the subscription was made on a credit, then power to issue bonds to represent such credit.

It is difficult to imagine what the Legislature meant by the use of the word "*bonds*" in the statute above quoted, if not that these municipalities, upon the approval of three-fourths of the voters being given, should have full power to make and execute all necessary *bonds* in order to carry out the intention of the voters so expressed. The *ipse dixit* of the Tennessee court in Pulaski v. Gilmore *supra*, that this was

"no authority for the issue of such bonds as are the basis of this suit,"

23 Tennessee Constitution 1870, Art. 2. sec. 29.

while declining to give any reason or explanation of what else could have been intended by the Legislature in the use of these words, can hardly have consideration here, standing as it does in positive contradiction to the express language used by the Legislature. The statute says that these municipalities shall have this power to execute bonds and make payments of such subscription when so approved by a popular vote. The Tennessee court seems to attempt a repeal of the statute, by its opinion, without reason or authority cited in its support, that the Legislature did not mean what it said. Such an opinion is of little weight.

The second decision of the Tennessee court above referred to[24] does not mention nor construe this statute, authority for the bonds in issue therein being sought for in the charter of the Tenn. Central R. R. Co., to which company defendant in error also pretended to subscribe in aid. As no question in issue nor authority relied on in that case is in any way involved in the case at bar, it is of no force here, unless as showing that defendant in error has enjoyed the good fortune of successful repudiation of its promises, though securing the benefits induced by the promise.

The Tennessee Legislature, however, in another act,[25] conferred express power on any and all incorporated towns or cities having a population of from one to twenty thousand to issue twenty-year eight per cent. bonds, "for the purpose of paying outstanding liabilities" against such town or city, or "*to the holders of bona fide claims against said city or town in liquidation and discharge of such claims and interest thereon, and to such others as are willing to take them at par, not to exceed in amount*" the sum of $15,000, provided that such issue of bonds was approved by a three-fourths popular vote. This was one of a series of laws authorizing towns and cities to issue bonds, another of which gave like power within larger limits to towns or

24 R. R. Co. v. Milan *supra*.
25 Act of 18 March, 1872, Appendix.

cities having a population of from eight to twenty thousand to issue bonds not exceeding $150,000 in amount.[26] Another granted to cities of a population of twenty thousand and upward to issue bonds not exceeding $300,000;[27] while by another act all towns and cities are granted power to issue bonds in settlement and compromise of their debts without limit;[28] and then again like power to issue bonds is conferred upon the several counties without other limit than three-fourths popular approval, and not to exceed in amount one-tenth the taxable value.[29]

These statutes unquestionably confer upon towns and cities having a population of one thousand or more the power to issue negotiable coupon bonds in payment of any liability, not exceeding $15,000, they might assume. The power is broad enough to include subscriptions in aid of railroads, and being without limitation as to the kind or character of obligations that might be paid in such bonds, no court can place a limit when the Legislature has made none.

Excepting the learned district judge, whose opinion below in this case is printed in the record and the Tennessee court in Pulaski v. Gilmore *supra*, no court or judge has construed either of the statutes of 1871 or 1872 *supra*, and his opinion in the only case other than this at bar, is now before this court for review.[30]

In that case it was held that even if the power to issue bonds was granted in the first clause of the second section of the act of 1871 *supra* when credit was loaned, yet that this power did not exist where the municipality became a stockholder under the last clause of that section.

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26 Acts Tennessee 1873, chap. 59.
27 Acts Tennessee 1871, chap. 143.
28 Acts Tennessee 1877, chap. 10.
29 Acts Tennessee 1887, chap. 3.
30 Green v. Dyersburg, 2 Flippin (6th Circuit Reports) 491.

This construction seems to me unwarranted by the very frame of the section, the two so-called clauses being parts of one sentence, undivided except by a semi-colon, and without words to express any intention of the law maker to provide for any other condition or circumstance than what had been provided for in the former words.

The whole purpose of the act was to amend the general laws on the subject of municipal subscriptions to the stock of railroads.[31]

It is a part of the legislative and judicial history of Tennessee that, under these laws, counties, towns and cities, while giving or lending credit in aid of such works of internal improvement, always have so done by subscribing for stock in the company constructing the road.

Aids or donations are unknown to the laws of Tennessee, except only as the municipality lending the aid receives stock in the improvement company. Under special acts a few municipalities may have undertaken and constructed some works for public use upon their own and sole account; but where such works of public improvement or public use have been constructed in Tennessee by any private "person, company, associatiou or corporation," and the aid of any town, city or county in that State has been granted thereto, no instance can be found where the municipality did not become a stockholder, subscribing for and receiving stock to the amount of the aid given or loaned.

On the trial below I challenged the learning of opposing counsel and the learned District Judge to instance a single case where a town or county in Tennessee had *donated* aid to any person, etc., for any public, much less private work.

In other States of the Union cases may be found where municipal *donations*, as distinct from subscriptions to the

31 Tennessee Code, sec. 1142, Appendix.
Green v. Dyersburg, 2 Flippin 491.

stock of internal improvement companies, have been made; but no instance of the kind can be found in Tennessee. With that people the universal usage in these matters has been and is, that, besides the requirement that the use or purpose for which the aid or credit is asked, shall be public, the municipality giving or lending aid thereto, always becomes an owner with others in the stock of the company or corporation constructing the work, and receives stock evidencing such ownership.

In Green v. Dyersburg *supra*, the court says that "*the only effect of this act* (16th January, 1871 *supra*,) *above quoted, or the constitutional provision referred to in it on the general law—and it so affects all special laws as well—is to abrogate all provisions allowing the subscriptions for stock to be made on less than a three-fourths vote of the qualified electors voting at the election in favor of it.*"

The general law, Code 1142 *supra*, provides that "any county, incorporated town or city may subscribe for stock," etc. As originally enacted, and before the statutes of Tennessee were codified (A. D. 1858), the act of which this section was a part, was entitled "An Act to Authorize and Regulate County Subscriptions for Railroad Stock," and grants the power only to subscribe for stock, etc.

These statutes all show that the municipality is to receive stock to represent the aid or credit given or loaned.

Again, this giving or lending of aid or credit by subscription of stock, etc., has never been authorized by general law in Tennessee, except toward building railroads. No general statute has ever authorized these town or county aids or credits to be given or loaned to turnpike, bridge, or other purposes; and while special acts, authorizing certain towns or counties to aid in constructing such other public works, are numerous, yet, in every one of these the municipality subscribed stock to represent the aid it gave or loaned.

The act of January 16, 1871, *supra*, is then to be read as a part of, and amendatory to, the prior general law on this subject—Code, secs. 1142–1165 *supra*—and the whole refers to stock subscriptions by towns and counties in aid of railroads, and this confirms my argument that full power is given by this act of 1871 to defendant in error to issue these bonds in payment of its subscription to the stock of the Mississippi Central Railroad Company.

III.

It is insisted for defendant in error, that the act of 1872 *supra*, cannot avail plaintiffs in error, because it says that, in 1873, its population was less than one thousand.

It must be admitted that, if we are to look to the proof on that point in the record, defendant's population is now proven to have been under that limit. However, I submit that defendant is estopped from raising that question, not only by said decree in the State chancery court, but also by the recitals in the bonds themselves.[32]

The act of 1872 *supra* prescribes no public record, such as the Federal census of population, or the State census of voters, or the poll at any preceding election, for determining whether the town or city had one thousand or more population—appoints no other officer or board to ascertain the fact—and it therefore follows that the Board of Mayor and Aldermen charged by the statute with all the duties regarding the subscription, submitting same to a popular vote, ascertaining the result, etc., etc., were also charged with the power and responsibility of determining whether there was the requisite population, as well as whether the amount proposed to be subscribed was within the one-

32 Marcy v. Oswego, 92 U. S. 637.
Coloma v. Eaves, 92 U. S. 484.
Buchanan v. Litchfield, 102 U. S. 290.
Wilson v. Salamander, 99 U. S. 499.

tenth of the taxable property limit of the law. Here we have legislative authority for the act, if the condition prescribed exists, and the only officers charged with any, and who are charged with every duty about the matter, determine that such conditions have been complied with, and thereupon act; and under the settled rule of this court, that is conclusive of the fact and is binding on the municipality. In the cases of Coloma v. Eaves, Marcy v. Oswego, and Wilson v. Salamander *supra*, there appears to have been no constitutional restrictions on the grant of power by the Legislature to the municipalities to make such subscriptions. The act of the Legislature in each case conferred general power to make the subscription, provided certain conditions precedent existed or had been complied with. These, in Coloma v. Eaves, were an approval by a majority of the legal voters of the town; in Marcy v. Oswego, that the amount of the bonds voted should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of the township, to pay the interest on the bonds issued, and the approval of three-fifths of the legal voters of the township; and in substance these were also the conditions in Wilson v. Salamander. In each of these cases it was held that the action of the municipal agents or authorities, charged with the duty and responsibility of issuing and certifying the bonds, in so doing and thereby certifying that such conditions precedent existed or had been complied with, was conclusive, and estopped the municipality from questioning these facts.

In Buchanan v. Litchfield and Dixon County v. Field,[33] the State Constitutions restricted and withheld the power to subscribe stock or aid such enterprise within prescribed conditions, and established certain public records as the standard for determination of whether the precedent conditions required did exist before the subscriptions might

33 Dixon County v. Field, 111 U. S. 83.

be made. There was nothing as to the existence of such conditions left to the municipal authorities for ascertainment or decision. In Buchanan v. Litchfield the record was "the last assessment for State and county taxes previous to the incurring of such indebtedness;" and in Dixon County v. Field the constitutional *proviso* was "shall not exceed ten per cent. of the *assessed valuation* of such county;" and the case of Bank v. Porter Township[34] falls within the same rule, for there the fact or condition precedent, that must have existed before the township could issue its bonds, was to be ascertained from the records of the county commissioners. The township could only issue such bonds where the county had not subscribed. If and when the county subscribed its records would show the fact, and the failure or refusal on the county's part would likewise appear by those records. The trustees of the township could ascertain the fact only from the records of the county, as indeed all others might do.

In Tennessee the Constitution confers express power on the Legislature to authorize towns and counties to make these subscriptions,[35] and places no other limit on its exercise except that of an approval by a three-fourths popular vote, while in Dixon County v. Field and other cases the power is withheld subject both to the approval of a popular vote and a limit in amount, to be ascertained from certain public records. In Tennessee the Legislature has granted the power that the Constitution authorized, and in both the act of 1871 and that of 1872 *supra*, has granted the further power to execute bonds in payment of the amount subscribed, and in the latter act has appointed no public record nor other officer for the determination of whether the requisite population, approval of popular vote, one-tenth of taxable property limit, etc., existed or had

34 The Bank v. Porter Township, 110 U. S. 608.

35 Tennessee Const. 1870, Art. 2, sec. 29.
Tipton County v. Locomotive Works, 103 U. S. 523.

been complied with. It seems, therefore, that this point comes directly within the rule of Marcy v. Oswego, etc., above, and that the defendant in error was concluded by the action of its board of mayor and aldermen in the issue of these bonds.

That they were assuming to act under the statute of 1872, as well as that of 1871, is evident from the allegation in their bill filed in the State chancery court for the purpose of adjudging these bonds invalid; that "at the time it was pretended to be held the population of Milan was less than one thousand inhabitants, and therefore not authorized by law to take stock in railroads, *issue bonds*, or levy a tax for their payment."[36] This allegation defendant in error "*retraxit*" when consenting to the final decree in said cause.[37]

In both these ways has defendant in error bound itself, and against plaintiffs in error, *bona fide* holders for value of the bonds and coupons it has thus issued and confirmed, it will not again be allowed to raise the question.

IV.

It was error to overrule the demurrer of plaintiffs in error, and to exclude the record of the State chancery court offered in evidence.

The defendant in error was the complainant in said proceeding in the State chancery court, and in that cause it admitted of record that its averments against the validity of said bonds were not true, and consented that a decree be rendered declaring them valid and binding obligations upon said town.

This municipal corporation had the power to sue and be sued, to contract and be contracted with. It was in a court of equity of general jurisdiction, before a learned chan-

36 Record pages 7–21.
37 Record pages 10–24.

cellor, with able and honest counsel. Now, after a lapse of ten years, during which time this chancery decree has remained in full force, with no steps taken to annul or avoid the same, can defendant in error in this proceeding, collateral to that in the State court, be heard to set up and rely upon alleged fraud in the procurement of said decree in order to avoid its effect when thus pleaded against it?

Fraud may be availed of alone by strangers to the former proceeding, for the purpose of impeaching a judgment obtained by fraud.[38] Mr. Bigelow says, at page 135, that

"no one who was a party to the former proceedings, or who might have intervened in or appealed from them, can, in a collateral proceeding, allege that the judgment was obtained by fraud, while the contrary is true as to persons who could not have thus intervened or appealed."

And in Christmas v. Russell the rule is stated that

"domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question, if rendered by a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial, or by bill in chancery. Third persons only, says Saunders, could set up the defense of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a *cognovit* or a warrant of attorney. * * * Subject to these qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. *Established rule is*, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, *mesne* or final, as the case may be, to execute judgment."[39]

In Tennessee the rule is, that

"whenever a court of chancery, or other court of general jurisdiction, possesses jurisdiction of the subject matter of litigation, and has acquired juris-

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38 Bigelow on Estoppel, pages 133–139.
Christmas v. Russell, 5 Wall. 290.
Kelley v. Mize, 3 Sneed 59.

39 R. R. Co. v. Sparhawk, 1 Allen, 448.
Kirby v. Fitzgerald, 31 N. Y. 417.
Hammond v. Wilber, 25 Vt. 346.
Mason v. Messinger, 17 Iowa 261.
R. R. Co. v. Wiggin's Ferry, 108 U. S. 18.
Whiteside v. Hassleton, 110 U. S. 300.

diction of the parties, as to third parties interested under its judgments and decrees, its proceedings cannot be held void after final disposition of the cause."[40]

The case of Christmas v. Russell *supra* was where the defendant pleaded that the judgment in the court of appeals of Kentucky, upon which he was sued in the Federal circuit court for Mississippi, was procured by fraud; to this plea the plaintiff demurred, and this court held that this demurrer should be sustained.

The later decision in U. S. v. Throckmorton,[41] does not conflict with Christmas v. Russell, for that was a direct proceeding on the part of the Government to have its grant set aside, upon the ground that the evidence upon which the grant was issued had been fraudulently obtained. The Government was a party to the first as well as the second proceeding, and by the latter sought to annul the former, because of the alleged fraud practiced therein, and by which the result was obtained. This was a direct proceeding to set aside the former adjudication, and not an attack against a former judgment by a party thereto as in Christmas v. Russel *supra*, nor as in this proceeding against defendant in error.

The replication sets up against the plea of former adjudication fraud in procuring such decree, want of authority in the agents and attorneys of defendant in error to consent thereto, and want of power in the chancery court of the State to render such decree.

Under the "*established rule*" of this court, above cited, defendant in error cannot rely on the first or second of these grounds in this collateral proceeding, and counsel

40 Greenlaw v. Kernahan, 4 Sneed 371.
Winchester v. Winchester, 1 Head 500.
Hoffer v. Fisher, 2 Head 253.
McGavock v. Bell, 3 Cold. 518.
Kendell v. Titus, 9 Heisk. 738.

41 United States v. Throckmorton, 98 U. S. 68.

for defendant in error will admit that the State chancery court had jurisdiction of the subject matter, being a court of general equity, jurisdiction, and of the parties, especially the defendant in error, who was complainant in the bill in the former case.

V.

The defendant in error was concluded by said chancery decree, even though rendered by its consent, as much as if the cause in which it was rendered had been heard upon pleading and evidence, and decided after argument in the usual way. The Mayor and Aldermen of Milan had power to sue and be sued, to contract and be contracted with. This corporation, through its duly qualified officers, itself invoked the aid of the State chancery court for the purpose of relieving itself from liability because of said subscription and bonds, and to have said bonds canceled and delivered up to it.[42]

In its said bill defendant in error denied that it had the power to issue said bonds, and urged the same grounds against its liability thereon as is set up here. The defendants in that case demurred. Pending determination of this issue of law, the town made a compromise of the matters, securing for itself stock in the new or consolidated company formed by the payee of said bonds and other companies.

Mr. Dillon says that

"growing out of its authority to create debts and incur liabilities, a municipal corporation has power to settle disputed claims against it, and an agreement to pay these is not void for want of consideration."[43]

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42 Record pages 8–23.

43 Dillon's Municipal Corp., sec. 477 (398).
Augusta v. Ledbetter, 16 Me. 45.
Bean v. Jay, 23 Me. 117–121.
Merrill v. Dixfield, 30 Me. 157.
People v. Supervisors, 27 Cal. 655.
People v. Coon, 25 Cal. 648.
Petersburg v. Mappin, 14 Ill. 193.
Supervisors v. Brown, 4 Lansing 24.
Meech v. Buffalo, 29 N. Y. 198.

So where a city council promised to pay a contractor a price for work done for the town, beyond that stated in the contract, the city was held bound; and an agreement to release a judgment was held binding, as well as the town's agreement to compromise a judgment obtained against a defaulting collector; and without special power a town having issued new bonds in lieu of old bonds which it did have authority to execute, the new bonds were held valid.[44]

It has been repeatedly held by the highest American courts that municipalities as well as individuals are bound by consent judgments, thus:

"As a general proposition, municipal corporations have the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and, where the amount is ascertained, to pay the same as other indebtedness."[45]

"Where a town is sued, a judgment may be entered against it, *by consent*, and while the judgment remains in force the town cannot bring a cross-action against the plaintiff, for having, in truth, no cause of action, but conspiring to obtain judgment from the town by false and fraudulent representations. * * * If this is open to the town now, we see no reason, in case it should prevail in this action, why the defendant may not, upon similar allegations in another suit, claim to re-try this action. The settled policy of the law will not permit a matter once adjudicated to be thus drawn in question again between the parties while the original judgment remains in force."[46]

This rule as to consent judgment is applied in all its force to judgments of dismissal by a party of his own suit, agreements to dismiss actions, retraxit, etc.

In Kentucky it is held that

"the legal deduction from a judgment dismissing a suit *agreed* is that the parties had, by their agreement, adjusted the subject matter of their controversy,

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44 Rogan v. Watertown, 30 Wis. 259.

45 Dillon's Mun. Corp., sec. 398.
City v. Balcer, 85 Ill. 563.
Dix v. Dunemeiston, 19 Vt. 263.
Griswold v. Stonington, 5 Conn. 367.

46 Wells' Res Adjudicata, sec. 443.
Hillsboro v. Nichols, 46 N. H. 384.

and its legal effect is to bar any other suit between them on that cause of action."[47]

In California, that

"where a suit is dismissed by agreement, it amounts to an open and voluntary renunciation of the matter in suit, and bars subsequent action thereon."[48]

No distinction exists between a title confessed, and one tried and determined.[49]

In Tennessee, as in other States, no appeal will lie from a judgment or decree made by consent of counsel, and the courts have repeatedly held that such judgments or decrees can be set aside only by original bill in equity to impeach for fraud.[50]

A compromise of matters in litigation by the authorities of the city of New Orleans, was held valid and binding on the city by this court; and in that case the question was that of the power of the authorities to bind the city by compromise;[51] and Gay v. Parpart, relied on by defendant in error in argument, in the court below, is no qualification of these authorities, for that was a direct proceeding to annul the former decree for fraud.[52]

In Louisiana it is held that

"a consent judgment is binding between the parties, and has the force and effect of the thing adjudged, unless reversed in the mode and within the time prescribed by law."[53]

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47 Bank v. Hopkins, 3 Dana 395.
Jarboe v. Smith, 10 B. Mon. 257.
Hahn v. Hart, 12 B. Mon. 427.

48 Freeman on Judgments, sec. 262.
Wood v. Raymond, 42 Cal. 643.

49 Freeman on Judgments, sec. 330.
Bradford v. Bradford, 5 Conn. 127.
Gates v. Preston, 41 N. Y. 113.
Green v. Hamilton, 16 Md. 317.
Secrist v. Zimmerman, 55 Pa. St. 446.

50 Jones v. Williamson, 5 Cold. 371.
Williams v. Neil, 4 Heisk. 279.
Richmond v. R. R. Co., 2 Patton & Heath (Va.) 327.

51 Board of Liq. v. R. R. Co., 109 U. S. 221.

52 Gay v. Parpart, 106 U. S. 679.

53 Dunn v. Pipes, 20 La. An. 276.
Greenwood v. New Orleans, 12 La. An. 426.

It will be borne in mind that in its bill in the State chancery court defendant in error directly assailed the validity of these bonds and coupons, setting up a want of power or authority in itself to so obligate; and stated, among other grounds therefor, that it did not have the requisite 1000 of population.

Under its compromise agreement defendant in error *retracted—retraxit*—these allegations, agreed that the bonds were binding upon it, and receiving a new consideration, re-sealed and again delivered these bonds and coupons.[54]

This court recently, having before it a plea of *res ajudicata* where the former judgment was by consent, after defining a *non-suit* and the difference between that and a *retraxit*, using the definitions given by Blackstone,[55] says that,

"it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary, expressed in the agreement and contained in the judgment itself, to be such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. Bank v. Hopkins, 2 Dana 395; Merritt v. Campbell, 47 Cal. 542. It is clearly so, when, as here, the judgment recites that the subject matter of the suit had been adjusted and settled by the parties. * * In the present case the suit was not dismissed by the plaintiff himself before the trial, nor by one party upon the written consent of the other, nor by the court for the plaintiff's failure to appear on the trial, nor by the court at the trial for an abandonment by the plaintiff of his cause; neither was it a dismissal by the court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at trial."

The judgment of dismissal was:

"It appearing to the court that the subject matter of this suit has been adjusted and settled by the proper parties in Washington, it is therefore ordered that this cause be and the same is hereby dismissed,"

to which the attorney for the plaintiff consented.[56]

This seems a parallel case, so far as concerns what was in the record of the former adjudication, to this at bar.

54 Record pages 10–24–25.

55 Blackstone Com., 3–296.

56 U. S. v. Parker, 120 U. S. 89–95.

And if the United States could be so bound by its consent, it would also seem that defendant in error would likewise be bound.

VI.

At the time this consent decree of the State chancery court was rendered, the defendants in that cause as then holders of these bonds and coupons, as well as obligees of the subscription of stock made by defendant in error, were holders of "*outstanding liabilities*" and "*bona fide claims*" against said town, within the meaning of said act of 1872 *supra;* and it cannot be successfully argued that under that statute it was not competent for the town, if possessed of one thousand population, to issue such bonds. This is what it did by and under said consent decree, confessing of record that it had the requisite population, and re-sealing and re-delivering said bonds for a new, valuable and then passing consideration.

The plaintiffs in error purchased these securities for value and in good faith, before maturity, after defendant in error had thus confessed their validity and re-issued them.

Certainly it was as competent for this town to so bind and estop itself as it was for Tipton county by acts *in pais*, after the Constitution of 1870 had been adopted, and which were by this court held to conclude it.[57]

VII.

The learned district judge was, I submit, in error as to the rule adopted by the State courts of Tennessee on the effect to be given to consent decrees pleaded as *res adjudicata*.

Hix v. Gosling[58] was where parties sought by original bill to impeach a decree that had been rendered in an action by their father and another (who had sold lands to their

57 County of Tipton v. Locomotive Works, 103 U. S. 523.

58 Hix v. Gosling, 1 Lea 560–567.

mother) against their mother, under which decree their mother's land had been decreed to their father. The parties to this second suit were not parties to the first action, and did not seek to avoid the former decree in any collateral proceeding, but filed their original bill in the nature of a bill of review to set aside the former decree for fraud. The first decree did not purport to be a consent decree, but was an attempt to divest a *femme covert* of title to real estate and vest same in her husband, through the medium of a chancery decree, without consideration and when she had no power to so transfer under the instrument that conferred the estate upon her. Relief was granted in this case, and the former decree was annulled for the fraud practiced upon the woman, who, beside the disability of coverture, was so feeble in body and mind as to occasion grave doubts as to her capacity for understanding anything of the matter. And all that the learned judge delivering the opinion of the Supreme Court of Tennessee says regarding an "entry of an agreement between parties upon the records of a court will not give to the agreement any greater validity than it had before," is purest *obiter dictum*. Not only so, but the cases cited in support of such *dictum* are not authority against the effect contended for of *res adjudicata* in favor of consent decrees.

The case of Rice v. Alley[59] was where a defendant, who was sued on a promissory note, pleaded as a set off the record of a county court of an *agreed* award of damages in his favor against the plaintiff for a private way across defendant's lands for plaintiff's benefit. To this the plaintiff replied the bar of the statute of limitations. It was held that this county court minute was not a record judgment, *because that court had no jurisdiction* to render such a judgment *inter partes*, nor for such matters, and that consent could not confer such jurisdiction (a rule that may be said to be universal), and the statute of limitations hav-

59 Rice v. Alley, 1 Sneed 52.

ing run against the plaintiff's promise to pay such damages, the set off was disallowed, although the statute of limitations against a record judgment had not run. There was no judgment to be set off.

Revis v. Wallace[60] was where Wallace pleaded in bar of Revis' action an entry from the minutes of the same court in a former suit by Wallace against Revis and another, which purported only to be Wallace's consent to dismiss upon some alleged agreement with Revis' father and the other defendant to that suit. Revis had not been served with process in such former suit, had not appeared nor made defense therein, and was in no way bound by Wallace's agreement with his father and Scott.

There is no word in the opinion of Chief Justice Nicholson in this case on the effect of consent judgments or decrees as *res adjudicata* or otherwise; and had there been, when there was nothing akin to that question in the case, it would have been of as little authority as the opinion, with no reference to that subject, is as precedent for the *dictum* in Hix v. Gosling, or the latter for the ruling of the court below in the case at bar.

Penniman v. Smith[61] is also cited in the opinion of the learned district judge as showing the rule in Tennessee. This was a case where Smith had recovered a decree in the State Supreme Court against the administrator of Allsup, and in that court, at the same term, he procured an entry to be made on the minutes reciting that he had assigned his recovery to another, "which," the entry adds, "the court permits to be filed and made a part of the record, and the clerk of the court will copy and send down with the decree of reversal to the chancery court." There was no pretense of any consent decree or settlement of any issue of the case. Thereafter Penniman & Bro., cred-

60 Revis v. Wallace, 2 Heisk. 658.
61 Penniman v. Smith, 5 Lea 130.

itors of Smith, garnisheed his recovery or decree, and the contest was between Smith's assignees and the Pennimans as garnishing creditors. Under the well-settled rule in Tennessee as to assignments of non-negotiable choses in action, requiring actual notice to the debtor as against subsequent assignees or attaching creditors, (Clodfelter v. Cox, 1 Sneed 330,) Penniman's garnishment prevailed over the earlier assignment so recorded on the minutes of the Supreme Court. "The court having, out of courtesy to the parties to the assignment, allowed them to make the entry, but adjudged nothing," certainly no decision could be made, as the most cursory glance over the opinion will show that none was made on the effect of a consent decree as *res adjudicata*.

This review of the Tennessee cases well shows that there is no adoption of the English doctrine on this subject by the Supreme Court of that State. Not one of the cases from that State cited in the opinion of the lower court, and no other, I think, can be found, pretends to be in any respect similar in its pleadings with that at bar, nor to raise the point we are considering.

Two opinions of Chancellor Cooper,[62] afterward a member of the Supreme Court of Tennessee, and who delivered the opinions in Hix v. Gosling *supra*, and in Penniman v. Smith *supra*, recognize the binding force of such consent decrees against a party consenting thereto.

The English rule may be as stated by the learned district judge in the opinion below, but as stated by Doctor Wharton,

"in this country, however, the tendency is to hold that the fact that consent enters into the composition of a judgment does not render it, if there be no fraud, the less effective as a bar. The same conclusion has been reached as to judgments by confession, though in England a judgment by default, as we have seen, does not preclude a party from afterward proving a set off he might have pleaded to the first suit."[63]

62 Dillard v. Harris, 2 Tenn. Chan. 193.
Mayo v. Harding, 3 Tenn. Chan. 237.

63 Wharton's Ev., sec. 783.

VIII.

The construction—in effect a repeal or nullification—placed on the statute of 16 January, 1871, *supra*, by the court of Tennessee in Pulaski v. Gilmore *supra*, should be of no authority here, because not announced until after the bonds or coupons now in suit had been issued, and the rights of plaintiffs in error had accrued. This court will examine and construe said statute as between these parties for itself, according as the right may now appear to be.[64] Especially when the Tennessee court had previously announced a far more liberal rule regarding the power of municipalities to issue such bonds. In September, 1884, that court said,

"the Knoxville & Kentucky Railroad Company was chartered in 1852, and was a railroad in which the county of Anderson might lawfully take stock under the Act of 1852, ch. 117. But this Act of 1852, ch. 117 (the Code, sec. 1142 *et seq.*), did not authorize bonds to be issued. We take it to be a sound principle, however, that a county, like another corporation, having a right to create a debt, has also the incidental right to issue the commercial evidences of it in such form as may be satisfactory to the parties."[65]

In that case Anderson county had no other authority in the first instance than defendant in error, though by a later act (1854) all such subscriptions and issue of bonds were declared valid.

IX.

In the original act of the Tennessee Legislature, chap. 117 of 1852, authorizing municipal subscriptions for railroad stock, and which is embraced in the sections of the Code of that State, printed in the appendix hereto, no power was specially given to issue bonds.

In 1856, however, the General Assembly, by chap. 123, secs. 4, 5 and 6 (see appendix), expressly recognized this

64 Carroll Co. v. Smith, 111 U. S. 556.
Anderson v. Santa Anna, 116 U. S. 356.

65 The State v. Anderson Co., 8 Bax. 254.
Nichol v. Nashville, 9 Hum. 250.

power as having been conferred, and the Act of 1858, known as the Code, does not repeal this act of 1856.[66]

The Act of 1871, above referred to, should be considered as a part of all this series of legislative acts, and when so done it is plain that the Legislature, in the expression "make and execute all necessary orders, *bonds* and payments," referred to negotiable bonds to be issued in payment of such subscription.

X.

The defendant in error had legislative authority for making the subscription of $12,000 to the stock of the railroad company, and was authorized to issue interest bearing warrants in payment of such subscription.[67] The courts of Tennessee had held that it was no objection to such subscription that the payments therefor were extended through a longer series of years than the statute prescribed.[68] This court has held regarding municipal contracts to issue bonds where there was no legislative authority therefor, that

"having received benefits at the expense of the other contracting party, it (the city) cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform."[69]

And, further, has, in order to sustain an issue of bonds by a county in Tennessee, rested for authority on the implications of a statute authorizing a railroad company to receive payment of subscriptions to its stock in county bonds, holding that

"what is implied in a statute is as much a part of it as what is expressed."[70]

The defendant in error does not plead nor offer any evidence to show that it has any equity against the demand

66 Code, sec. 42–3, Appendix.
67 Code of Tennessee, sec. 1142–1160, post Appendix.
68 R. R. Co. v. Davidson Co., 1 Sneed 537.
Ross v. Anderson Co., 8 Bax. 249.
69 Hitchcock v. Galveston, 96 U. S. 351.
70 County of Wilson v. National Bank, 103 U. S. 777.

of plaintiffs in error, no question of payment, or want of consideration, etc., but rests its defense on the naked technical plea of *ultra vires*. These bonds should come within the implied powers of the town as stated by Mr. Justice Hunt, Justices Clifford, Swayne and Strong concurring;[71] and having the power to incur such debt for such purpose, as well as to issue interest bearing notes (warrants) evidencing its indebtedness, admitting, as the stipulation shows, that it received the consideration and benefit for which its bonds were given, defendant in error should be held liable.

HOLMES CUMMINS,
Attorney.

J. B. HENDERSON,
Of Counsel.

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71 The Mayor of Ray, 19 Wal. 483.

APPENDIX.

OF PROVISIONS APPLICABLE TO THE WHOLE CODE.

42. All public and general acts passed prior to the present session of the General Assembly, and all public and special acts the subjects whereof are revised in this Code, except acts establishing or regulating special courts, subject to the limitations and with the exceptions herein expressed, are hereby repealed. And in case of conflict between the acts of this session and this Code, the latter shall be controlling.

(See 3 Heis. 467; 1 Bax. 103, 312; 5 Lea 140.)

43. Local, special and private acts and acts of incorporation heretofore passed, are not repealed, unless it be herein so expressed, nor are the occupant, entry and other land laws.

CODE OF TENNESSEE.

1142. Any county, incorporated town, or city, may subscribe for stock to an amount not exceeding in the aggregate one-fifteenth (amended to one-tenth) of its taxable property, nor more than one million dollars, in railroads, running to, or contiguous thereto, upon the following terms and conditions:

1143. The approbation of the legal voters of the county, town, or city, to the proposed subscription, must first be obtained by election held by the sheriff in the usual way in which popular elections are held.

1144. The election may be ordered by the county court or corporate authorities of the town or city, upon the application in writing of the commissioners appointed to open the subscription books for the stock of such road, or of the board of directors, if the company is organized.

1145. Before such application can be made, the entire line of the road, in which the stock is proposed to be taken, shall be surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road, and an estimate of the grading, embankment and masonry, made by the engineer, under oath, and filed with the application.

1146. The election shall be advertised at least 30 days beforehand by notices posted up at the different places of voting, specifying the time when it is to be held, for what road, the amount of stock proposed to be taken, and when payable.

1147. At the election thus held, those voters who are in favor of the subscription will put on their tickets the words, "For subscription;" those opposed, "No subscription."

1148. If a majority of the legal voters of the county, town or city, as the case may be, estimating the vote by the last preceding governor's election, should be in favor of the subscription, the judge or chairman of the county court, or the mayor of the corporation, shall subscribe the amount of stock so voted for, in the name of the county or corporation.

1148*a*. That section 1148 of the Code be so amended as to read as follows, to-wit: If the majority of the votes cast of a county, town or city, as the case may be, should be in favor of the subscription, the judge or chairman of the county court, or president of the board of county commissioners, or the mayor of the corporation, shall subscribe the amount of stock so voted for in the name of the county or corporation.

1148*b*. Should any county, town or city fail to vote the subscription to any railroad company at any election held for the purpose, said county, town or city may at any time after 30 days order another election, if desired by the railroad company, such election to be held by the commissioners of registration, as now provided by law.

1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken, or as near thereto as practicable.

1150. As soon as the stock is subscribed, it is the duty of the county court, or corporate authorities, to levy a tax upon the taxable property, privileges and persons, liable by law to taxation within the county or corporation limits, sufficient to meet the installments of subscription as made, and the cost and expenses of collection, which tax shall be levied and collected like other taxes.

1154. Not more than thirty-three and one-third per cent. of the stock subscribed as above can be collected in any one year.

1155. The tax-collector, as fast as he makes collections, shall pay the amounts over to the company.

1156. He shall also, as he receives the tax, give to each taxpayer a certificate in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate to be delivered to the president of the railroad company, and such certificate is negotiable by delivery or assignment, and, with a deduction of its proportion of the cost of collection, is receivable in payment of either freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road.

1157. The holder of such certificates to the amount of one share or more of the stock of such railroad company, is entitled to demand and receive from the company in lieu thereof, a certificate of stock in the capital stock of such company, which will give him all the privileges of any other stockholder.

1160. For the purpose of meeting unexpected contingencies, the county or corporation authorities may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent. interest, and payable at such times as may be desired by the railroad company, the warrants to be received as payment of so much stock.

1161. In such a case a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due.

Chapter 20, Acts 1872.

An act to authorize the mayor and city council, or mayor and board of aldermen, of any incorporated city or town, in the State of Tennessee, having a population of from one thousand and upward to twenty thousand inhabitants, to issue bonds of said city or town to the amount of $15,000.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the mayor and city council, or the board of mayor and aldermen, of any incorporated city or town, in the State of Tennessee, having a population of from one thousand to twenty thousand, are hereby authorized in their corporate capacity to issue the bonds of the said city or town, signed by the mayor, and countersigned by the recorder of said city or town, with coupons for interest attached, to an amount not exceeding fifteen thousand dollars. The bonds herein provided for may be executed of denomi-

nations from twenty-five to five hundred dollars, at direction of said mayor and city council, or mayor and aldermen, and to mature at such times as may be fixed by said mayor and city council, or mayor and aldermen, from one to twenty years after date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, the past due coupons on which bonds shall be receivable for taxes, and all other dues to the corporation issuing the same;

Provided, That the bonds issued under the provisions of this act shall be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them; and shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation, at the time of issuance thereof; but in no event shall the bonds be issued without the consent of three-fourths of the qualified voters, voting at an election to be held for that purpose under the supervision of said mayor and city council or board of aldermen.

SEC. 2. *Be it further enacted*, That the said mayor and city council, or mayor and aldermen of said city or town, are hereby authorized to issue at par such coupon bonds as are provided for in this act, to the holders of *bona fide* claims against said city or town, in liquidation and discharge of such claims and interest thereon, and to such others as are willing to take them at par, not to exceed in amount said sum of fifteen thousand dollars, provided that such bonds shall not be sold for less than par, and that the interest rate shall be stated in the submission to the popular vote.

Provided, That in no case shall said mayor and city council, or mayor and aldermen of said city or town, as the agent for that purpose, sell under the par value any of these bonds, the issuance of which is authorized by this act.

Provided further, That the proposed rate of interest the bonds are to bear shall be specified, and submitted to the vote of the inhabitants of such corporations, at the time the election is held in regard to the issuance of the bonds.

Passed March 18, 1872.

Chapter 50, Acts 1870–71.

An act to enforce article 2, section 29, of the constitution, to authorize the several counties and incorporated towns in this State to impose taxes for county and incorporation purposes.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the several counties and incorporated towns in this State may, and are hereby authorized to impose taxes for county and corporation purposes, respectively, in the following manner, and upon the following conditions:

1. That all taxable property shall be taxed according to its value, upon the principles established in regard to State taxation.

2. *The credit of no county, city or town, shall be given* or loaned to, or in aid of any person, company, association or *corporation*, except first, upon the consent of a majority of the justices of the peace of the county, at a quarterly term of the county court of such county, or a majority of the board of mayor and aldermen, as the case may be, of such city or town, and upon an election afterward held by the qualified voters of said county, city or town, and the assent of three-fourths of the votes cast at said election. The said county court, or board of mayor and aldermen, as the case may be, shall spread upon their records the proposition and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this State; and if the assent of three-fourths of the voters of such county, city or town is had, then the county court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds and payments, in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city or town become a stockholder with others, in any company, association or corporation, except upon a like election, and the assent of a like majority, as prescribed in this act.

Passed January 16, 1871.

Chapter 123.

An act to amend the charter of the Tennessee & Alabama Railroad Company, and for the benefit of the Mississippi Central & Tennessee Railroad Company, and for other purposes.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Tennessee & Alabama Railroad Company is hereby authorized to purchase and hold the entire capital stock of the Franklin Turnpike Company, upon such terms as may be agreed upon between said Railroad Company and said Turnpike Company.

* * * * * * *

Sec. 4. *Be it enacted*, That in all cases where a county, city or town has subscribed, or may hereafter subscribe, for stock in any railroad company, and has executed, or may hereafter execute, a bond or bonds in payment of the stock subscribed, it shall be lawful, and power and authority are hereby given to the railroad company, county, city or town, to rescind the contract of subscription, upon such terms as may be agreed upon by the parties, in whole or in part, or to make an arrangement by which the railroad company may borrow and use any or all of the bonds, upon giving a guaranty against the principal and interest of the bonds, and receiving a release of the subscription of the stock.

Sec. 5. *Be it enacted*, That the president and directors of the railroad company, the justices of the county court—a majority of them concurring—or the mayor and aldermen of the city or town, may make the contract or arrangements herein authorized.

Sec. 6. *Be it enacted*, That in case any bond or bonds shall be loaned under any arrangement made under this act, that the county, city or town shall have a lien on the capital stock of the railroad company, to the amount of the bond or bonds so loaned, as a security for the guaranty against the payment of the principal and interest of the bonds.

Passed February 21, 1856.

OPINION.

MAYOR AND ALDERMEN OF PULASKI
vs.
GILMORE & CHERRY, O'CONNOR & Co.

Nashville. 1880.

In 1874, the Directors and Commissioners of the Memphis & Knoxville Railroad Company petitioned the Board of Mayor and Aldermen of the town of Pulaski for a subscription of $40,000 to their capital stock, on such terms and limitations as the board might see proper. The question was submitted to a vote of the people and approved by the requisite majority. The proposition involved the idea of issuing bonds having twenty years to run, each of the denomination of $500, bearing eight per cent. interest; stock to be issued to the corporation equivalent in amount to the bonds thus proposed to be issued. As part of the proposition, it was agreed that these bonds of $500 each were to be issued to pay for the expenses incident to a survey of the line of the road through Giles county. These bonds were issued and came into the hands of the parties plaintiff in this case before due, and are the basis of the present suit.

We may assume, for the purposes of this opinion, that the proceedings, if not perfectly regular, have nothing in them that can fix any right to urge it against the present holders. They stand as innocent purchasers for value. The only defense that can be made available against the liability sought to be enforced, is a want of authority in the corporation to issue the bonds in question. This is a defense at all times available in such a case, unless it may be the doctrine of estoppel *in pais* may be an exception allowed in certain cases.

The question then is, did the corporation, under the Constitution and laws of the State, have the power to issue these bonds? If so, plaintiff was entitled to his recovery on the coupons, if not, defendant should have had a verdict.

It is the case of a subscription to the stock of a contemplated railroad. The fact that these particular bonds were to be applied to pay for a specific part of the work necessary in the construction of the road, cannot alter the character of the bond nor aid in arriving at a solution of the question of power. Whether to be used for

this, or any other purpose connected with the construction of the road, the case would be the same. The proposition submitted to the people, and the contract attempted to be made, was simply a subscription for $40,000 of stock in the corporation, which was expected to build the road, and the bonds of the corporation (these three included) were to be issued in paying for said stock.

By our present Constitution, which in this respect is the same as that of 1834, sec. 2, Art. XXIX, the General Assembly shall have power to authorize counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to State taxation. By the Constitution of 1870 there is added, "But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at such election." We need not examine, discuss or decide the question whether the addenda gives any additional or different power to the Legislature from that conferred in the first clause of the section quoted, that is, to levy taxes for county and corporation purposes, respectively.

It suffices that it was decided many years since that a railroad was a county and corporation purpose, and taxes might be levied under authority from the Legislature, to be used in aid of such enterprises. It is not improper to say that while this is all now settled in our State as an original question, the writer of this opinion did not and does not now concur in its correctness.

The question, however, is whether, under the statutes existent at this time, these bonds were authorized, the power to issue them is given. We need not, as we have said, go into the question of the constitutional power to authorize them. We need scarcely say that in order to the issuance of such bonds there must be an express authority given the city or town, either by a general law of the land, or by a special law for this purpose. No such power can be implied or can be inferred from any of the ordinary powers of such corporations. "No argument," says Judge McKinney, in the case of Cook & Steadman v. Sumner Spinning & Mfg. Co., 1 Sneed 714, "can be necessary to show that the authority to purchase stock in

a manufacturing company, or to issue bonds for the payment thereof, cannot be derived simply from the power of taxation conferred in a charter." See also 9 Heisk. 534.

Taxation and payment of all liabilities directly from this means is the normal work of action by such bodies. Bonds on time are not incident to this, and can only be issued when authority is conferred by law.

The old act of 1852, Code, section 1142, and other provisions of that article is the basis in our general law for such action as may be taken by counties and corporations in subscribing for stock in railroads running to or contiguous to such towns. It is too clear for argument that no such authority is found in these sections.

The act of January, 1871, intended to regulate elections, under the Constitution, in first section, simply embodies the authority contained in the Constitution, as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can possibly be construed on any fair principle of construction to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company. What was intended by the reference to "execution of all necessary orders, bonds and payments, in order to carry out" a loan or credit, we need not now determine. See sec. 2, Code, sec. 491*a*. It suffices that there is no authority in this act to issue such bonds as are the basis of this suit; the same having been issued without authority of law, are simply void, whether in the hands of innocent purchasers or others.

Reversed, etc. (Signed) FREEMAN, J.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 206.

KELLEY & ALEXANDER, PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

J. B. HENDERSON,
Attorney,
With HOLMES CUMMINS.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 206.

KELLEY & ALEXANDER, PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

STATEMENT OF CASE.

This is an action brought by the plaintiffs in error in the circuit court of the United States for the western district of Tennessee praying judgment on certain interest coupons maturing from July 1, 1876, to July 1, 1881, both inclusive, and detached from bonds issued by the authorities of the town of Milan, in Gibson county, Tennessee.

The bonds are twelve in number, each for $1,000, and bear date July 1, 1873, and are made payable to the Mississippi Central Railroad Company or bearer, in New York city, on or before July 1, 1893, with interest at the rate of seven per cent. per annum, payable annually on July 1 of each year on presentation of coupons.

The bonds recite on their face that they are issued "in consideration of the location of the Mississippi Central railroad by said town and in pursuance of the laws of Tennessee authorizing the same," and that "the people of Milan voted the same by a majority and in the form required by law, the vote being in pursuance of due notice, and in all respects according to the laws of Tennessee."

The bonds contain the further recital that "the town of Milan, by its mayor and aldermen, hereby pledges the legal responsibility and the faith of said town for the said coupons and bonds according to the terms and effect hereof."

It is admitted in the stipulation of counsel, on which the case was tried, that the bonds and coupons were issued in payment of a stock subscription previously made by the authorities of the town to said railroad company to aid in extending its line of road from Jackson, Tennessee, to Cairo, Illinois, and to secure the location of the road through the defendant town. It is also admitted that said extension of road was fully completed in the year 1873 through the town as agreed, and that the line of road thus built has been operated ever since as a railroad. The record shows that Milan is and was an incorporated town.

After the railroad was built and put in operation and the first coupon had become due, the mayor, together with the members of the board of aldermen, on the 10th day of July, 1874, filed a bill for and on behalf of said town in the chancery court of Gibson county, Tennessee, against the Mississippi Central Railroad Company and against H. S. McComb, the president of said company, and others of its agents and officials, in which they pray an order of injunction against the negotiation of the bonds by the defendants, and that on final hearing the bonds and coupons be delivered up and canceled.

The grounds alleged for the interposition of the Court are—

First. That the entries on the town records touching the question of an election to authorize the issue of the bonds are defective and do not justify their issue. The minutes copied into the bill from the town records show that on May 11, 1872, the mayor and aldermen, in a regular meeting, ordered an election to be held in the town on June 12, 1872, to determine whether the twelve bonds, each for $1,000, with interest at 7 per cent., should be issued to the Mississippi Central Railroad Company on the conditions that said road should be extended from Jackson to the town of Milan and intersect with or cross the Memphis and Louisville railroad at the point agreed on between the said company and the committee of the defendant town; and, further, that at a meeting held on June 17, 1872, the returns of the election held on the 12th of June were made and canvassed by the board, showing a vote for the proposition of 117 "for subscription," and 2 "no subscription."

Second. The bill charges that the election was held by order of the mayor and aldermen without any previous, contemporaneous, or subsequent application to them in writing for that purpose.

Third. That the election was ordered to be held and was held by the town marshal or constable and not by the sheriff of Gibson county, as required by section 1143 of the Tennessee Code in such cases.

Fourth. That the marshal received votes into the ballot-box at places not fixed by law.

Fifth. That at the time the stock was subscribed no survey of the entire line of road had been made, and the road located by designating its termini, and no estimate of cost had been made and filed with the mayor and aldermen as required by law; and,

Sixth. That at the time of ordering said election and at the time it was pretended to be held, "the population of the town of Milan was less than one thousand inhabitants," and it (the town) was, therefore, not authorized by law to take stock in railroads or to issue bonds or levy a tax for their payment.

The bill then charges that, notwithstanding all these facts, the mayor and aldermen did, on the 23d day of June, 1873, order the mayor to execute and deliver to the Mississippi Central Railroad Company twelve bonds of the denomination of $1,000 each, payable to said company or bearer, dated July 1, 1873, at twenty years, bearing 7 per cent. interest, and that the mayor did so issue and deliver the same, and the bonds and coupons are still in the hands of the company.

The bill then charges as follows:

"Complainants are advised that they are not bound as a corporation or otherwise to pay said bonds; that their issuance was contrary to law; but they are advised that should said company sell said bonds to innocent purchasers they would be bound in law to pay the same; and they are advised and believe, and so charge, that the officers of said road will sell and assign said bonds, with the view of making said corporation of Milan liable, if they have not already done so, in part."

To this bill the respondents filed a general and special demurrer. (Record, pp. 23 and 24.)

The next entry in the case is as follows:

"Be it remembered that this cause, this 9th of January, 1875, came on to be heard and was heard before Hon. John Somers, chancellor, &c.; and, it appearing that this suit has been settled by the following agreement, to wit:"

The agreement between the town and the railroad company, after reciting the issue of the bonds, the institution of the proceedings in equity, and the consolidation of the Mississippi Central Company with the New Orleans, Jackson

and Great Northern Company, forming the New Orleans, St. Louis and Chicago Railroad Company, proceeds as follows:

"The said New Orleans, St. Louis and Chicago Railroad Company is to issue to the town of Milan certificates of stock in the sum of $500 each, dollar for dollar, for the said bonds; and the said town of Milan on its part agrees on receipt of said stock to let a decree be entered in said cause in favor of the validity of said bonds, which are to be redelivered with the seal of the town affixed, and the cost of said suit to be paid by the said railroad company," &c.

This agreement is signed by the mayor for the town and by A. M. West, second vice-president of the railroad company.

The decree of the chancery court then follows, in these words:

"In pursuance of this agreement and by consent of parties, it is ordered, adjudged, and decreed that the New Orleans, St. Louis and Chicago Railroad Company shall issue to the town of Milan certificates of stock in said company in sums of $500 each, dollar for dollar, for said twelve bonds of $1,000 each referred to in the bill; and it is further ordered, adjudged, and decreed that on the presentation of these certificates of stock the town of Milan shall have the corporate seal of said town affixed to each of said twelve bonds and delivered to H. S. McComb, to whom they rightfully belong, or his authorized agent, and said bonds and coupons attached are declared to be valid and binding on said town and its authorities. It is, by consent, further ordered, adjudged, and decreed that the injunction be dissolved, the demurrer herein filed be, and the same is hereby overruled, and this decree is declared a final settlement of the rights of the parties," &c. (Record, pp. 24, 25.)

It is admitted in this case that at the election held, the propositions to take the stock in the railroad company and to issue the bonds therefor were submitted together as a single proposition, "at one and the same time, and was approved by the requisite majority." (Record, p. 25.)

It is also admitted by counsel that the plaintiffs in error purchased the bonds and coupons in controversy, before maturity, for value, and after the rendition of the said decree in chancery by which they were declared to be a valid and binding obligation on the town. (Record, p. 25.)

The bonds having been repudiated a second time, in 1876, and this suit having been brought, the defendant now pleads *non est factum*, denying any authority whatever for the issue thereof; and to a replication of *res adjudicata* by plaintiff, based on the decree of the chancery court of Tennessee adjudging the bonds to have been legally issued before the plaintiffs purchased them in the market, the town authorities plead their own fraud in making the agreement on which the Tennessee court so adjudged.

The Code of Tennessee in force at the time and adopted in 1852 in respect of municipal subscriptions is as follows:

Code of Tennessee.

1142. Any county, incorporated town, or city may subscribe for stock to an amount not exceeding in the aggregate one-fifteenth (amended to one-tenth) of its taxable property nor more than one million dollars, in railroads running to or contiguous thereto upon the following terms and conditions:

1143. The approbation of the legal voters of the county, town, or city to the proposed subscription must first be obtained by election held by the sheriff in the usual way in which popular elections are held.

1144. The election may be ordered by the county court or corporate authorities of the town or city upon the application in writing of the commissioners appointed to open the subscription books for the stock of such road or of the board of directors, if the company is organized.

1145. Before such application can be made the entire line of the road in which the stock is proposed to be taken shall be surveyed by a competent engineer and substantially located by designating the termini and approximating the general direction of the road, and an estimate of the grading,

embankment, and masonry made by the engineer under oath and filed with the application.

1146. The election shall be advertised at least 30 days before hand by notices posted up at the different places of voting, specifying the time when it is to be held, for what road, the amount of stock proposed to be taken, and when payable.

1147. At the election thus held those voters who are in favor of the subscription will put on their tickets the words, "For subscription;" those opposed, "No subscription."

1148. If a majority of the legal voters of the county, town, or city, as the case may be, estimating the vote by the last preceding Governor's election, should be in favor of the subscription the judge or chairman of the county court or the mayor of the corporation shall subscribe the amount of stock so voted for in the name of the county or corporation.

1148*a*. That section 1148 of the code be so amended as to read as follows, to wit: If the majority of the votes cast of a county, town, or city, as the case may be, should be in favor of the subscription the judge or chairman of the county court or president of the board of county commissioners or the mayor of the corporation shall subscribe the amount of stock so voted for in the name of the county or corporation.

1148*b*. Should any county, town, or city fail to vote the subscription to any railroad company at any election held for the purpose, said county, town, or city may at any time after 30 days order another election, if desired by the railroad company, such election to be held by the commissioners of registration as now provided by law.

1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken or as near thereto as practicable.

1150. As soon as the stock is subscribed it is the duty of the county court or corporate authorities to levy a tax upon the taxable property, privileges, and persons liable by law to taxation within the county or corporation limits, sufficient to meet the installments of subscription as made, and the cost and expenses of collection, which tax shall be levied and collected like other taxes.

1154. Not more than thirty-three and one-third per cent. of the stock subscribed as above can be collected in any one year.

1155. The tax collector, as fast as he makes collections, shall pay the amounts over to the company.

1156. He shall also, as he receives the tax, give to each tax-payer a certificate, in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate, to be delivered to the president of the railroad company, and such certificate is negotiable by delivery or assignment, and, with a deduction of its proportion of the cost of collection, is receivable in payment of either freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road.

1157. The holder of such certificates, to the amount of one share or more of the stock of such railroad company, is entitled to demand and receive from the company, in lieu thereof, a certificate of stock in the capital stock of such company, which will give him all the privileges of any other stockholder.

1160. For the purpose of meeting unexpected contingencies the county or corporation authorities may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent. interest, and payable at such times as may be desired by the railroad company, the warrants to be received as payment of so much stock.

1161. In such a case a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due.

Laws of Tennessee, page —.

In 1856 the following provisions of law were enacted (chapter 123), to wit:

SEC. 4. *Be it enacted*, That in all cases where a county, city, or town has subscribed or may hereafter subscribe for stock in any railroad company and has executed or may hereafter execute a bond or bonds in payment of the stock subscribed, it shall be lawful, and power and authority are hereby given to the railroad company, city, or town, to rescind the contract of subscription upon such terms as may be agreed upon by the parties, in whole or in part, or to make an arrangement by which the railroad company may borrow and use any or all of the bonds upon giving a guaranty against the princi-

pal and interest of the bonds and receiving a release of the subscription of the stock.

SEC. 5. *Be it enacted*, That the president and directors of the railroad company, the justices of the county court—a majority of them concurring—or the mayor and aldermen of the city or town may make the contract or arrangements herein authorized.

SEC. 6. *Be it enacted*, That in case any bond or bonds shall be loaned under any arrangement made under this act the county, city, or town shall have a lien on the capital stock of the railroad company to the amount of the bond or bonds so loaned as a security for the guaranty against the payment of the principal and interest of the bonds.

In 1870 a new constitution was adopted in Tennessee, containing the following provisions, to wit:

CONSTITUTION, 1870.—ARTICLE II.

SECTION 29. The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law, and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder, with others, in any company, association, or corporation, except upon a like election and assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Jenkes, Van Buren, White, Putnam, Overton, Jackson, Cumberland, Anderson, Wayne, Marshall, Cocke, Mason, and the new county herein authorized to be established out of the fractions of Sumner, Macon, and Smith counties, and Roane shall be excepted out of the provisions of this section, so far that the assent of a majority of the qualified voters of either of said counties, voting on the question, shall be sufficient when the credit of such

county is given or loaned to any person, association, or corporation: *Provided*, That the exception of the above-named counties shall not be in force beyond the year one thousand eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State.

In 1871 (chapter 50, acts 1870–1871) an act of the Legislature was approved, as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the several counties and incorporated towns in this State may, and are hereby authorized to, impose taxes for county and corporation purposes, respectively, in the following manner and upon the following conditions:

1. That all taxable property shall be taxed according to its value upon the principles established in regard to State taxation.

2. *The credit of no county, city, or town shall be given* or loaned to or in aid of any person, company, association, or *corporation*, except, first, upon the consent of a majority of the justices of the peace of the county at a quarterly term of the county court of such county or a majority of the board of mayor and aldermen, as the case may be, of such city or town, and upon an election afterward held by the qualified voters of said county, city, or town, and the assent of three-fourths of the votes cast at said election. The said county court or board of mayor and aldermen, as the case may be, shall spread upon their records the proposition, and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this State; and if the assent of three-fourths of the voters of such county, city, or town is had, then the county court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds, and payments in order to carry out such loan or credit voted for as prescribed in this act, nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority, as prescribed in this act.

On March 18, 1872, the Legislature adopted the following act, entitled "An act to authorize the mayor and city council or mayor and board of aldermen of any incorporated city or town in the State of Tennessee having a population of from one thousand and upward to twenty thousand inhabitants, to issue bonds of said city or town to the amount of fifteen thousand dollars."

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the mayor and city council or the board of mayor and aldermen of any incorporated city or town in the State of Tennessee, having a population of from one thousand to twenty thousand, are hereby authorized, in their corporate capacity, to issue the bonds of the said city or town, signed by the mayor and countersigned by the recorder of said city or town, with coupons for interest attached, to an amount not exceeding fifteen thousand dollars. The bonds herein provided for may be executed of denominations from twenty-five to five hundred dollars, at direction of said mayor and city council or mayor and aldermen, and to mature at such times as may be fixed by said mayor and city council or mayor and aldermen, from one to twenty years after date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, the past-due coupons on which bonds shall be receivable for taxes and all other dues to the corporation issuing the same:

Provided, That the bonds issued under the provisions of this act shall be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them, and shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuance thereof; but in no event shall the bonds be issued without the consent of three-fourths of the qualified voters voting at an election to be held for that purpose under the supervision of said mayor and city council or board of aldermen.

SEC. 2. *Be it further enacted,* That the said mayor and city council or mayor and aldermen of said city or town are hereby authorized to issue at par such coupon bonds as are provided for in this act to the holders of *bona fide* claims against said city or town in liquidation and discharge of such claims and interest thereon, and to such others as are

willing to take them at par, not to exceed in amount said sum of fifteen thousand dollars, provided that such bonds shall not be sold for less than par, and that the interest rate shall be stated in the submission to the popular vote:

Provided, That in no case shall said mayor and city council or mayor and aldermen of said city or town, as the agent for that purpose, sell under the par value any of these bonds the issuance of which is authorized by this act:

Provided further, That the proposed rate of interest the bonds are to bear shall be specified and submitted to the vote of the inhabitants of such corporations at the time the election is held in regard to the issuance of the bonds.

On February 23, 1870 (session acts 1869–1870), an act was passed making it lawful after June 1, 1870, to contract in writing for any rate of interest not exceeding ten per cent. per annum.

ARGUMENT AND AUTHORITIES.

I.

Under the General Code of Tennessee the town had an undoubted right to subscribe for the stock of the railroad company as it did.

II.

It is equally clear that, although under the code provisions, the town authorities could not levy by way of tax on the people more than 33⅓ per cent. of the whole subscription in any one year, yet they could, under those provisions, admit the whole subscription to be at once due, and issue time warrants therefor at 6 per cent. and payable at such times, long or short, as might be desired by the railroad company, the warrants to be received as payment of so much stock.

III.

It is admitted in the record of this case that the railroad extension, to secure which this stock was subscribed, was fully completed in 1873, and the same was being operated through the town, as stipulated for. It is, therefore, but a reasonable presumption that the company, before completing its road, had called for payment of all its stock subscriptions, and that in 1873, when the bonds were issued, the stock of the town had been called and was then due and "an outstanding liability" of the town.

IV.

If the preceding propositions be true, then the town had express power, under the act of March 18, 1872, to issue in payment for said stock its coupon bonds, to run 20 years, at not exceeding 8 per cent. per annum, payable semi-annually. By this act "any incorporated town (Milan being such) having a population of from one thousand to twenty thousand" is authorized to issue bonds "to an amount not exceeding fifteen thousand dollars."

The only conditions of the issue are that the bonds shall be "for the purpose of paying outstanding liabilities against the city or corporation issuing them;" that they shall not "exceed the unsettled and matured liabilities or debts" of the city at the time of the issuance; that they shall be authorized by the assent "of three-fourths of the qualified voters voting at an election to be held for that purpose under the supervision of said mayor and city council or board of aldermen;" that "the rate of interest the bonds are to bear shall be specified and submitted to the vote of the inhabitants * * * at the time the election is held in regard to the issuance of the bonds," and that the bonds shall be paid out at not less than par "to the holders of *bona fide* claims against said * * * town in liquidation and dis-

charge of such claims and interest thereon, * * * not to exceed in amount said sum of fifteen thousand dollars."

Under this head the following observations are pertinent:

First. The recitals in the bonds estop the municipality from denying their validity or regularity, provided any law of Tennessee at the time authorized their issue.

The recitals are that the town issued them, after the citizens thereof had authorized the issue, "in pursuance of the laws of Tennessee," and that the town authorities acted under "authority given them by the people" and "in obedience to a duty required" of them, and the town pledges on the face of the bond "the legal responsibility and the faith of the town for the payment of the bonds and coupons according to the terms and effect thereof."

Second. Where bonds recite that they are issued under a valid law authorizing the issue thereof, the law presumes that all prerequisite facts have been complied with, such as an election, the advertisement thereof for a sufficient time, and also that the vote was sufficient, &c. A *bona fide* purchaser is authorized to rely on the recitals, and he cannot be affected by any irregularities in the issue. If there were power to issue the bond, *under any circumstances*, the law presumes the issue to have been, under the circumstances, necessary to its validity.

Humboldt T'p *vs.* Long, 92 U. S., 642.
Marcy *vs.* Township of Oswego, 92 U. S., 637.
County of Moultrie *vs.* Rockingham Savings Bank, 92 U. S., 631.

A holder of bonds need not look beyond the recitals in the bonds and the legislative enactment authorizing their issue.

Walnut Township *vs.* Wade, 103 U. S., 683.

A recital in the bonds that they are issued in compliance with law estops the municipality from asserting the contrary.

Oregon *vs.* Jennings, 119 U. S., 95.

Nor will irregularities overcome or affect the presumption that the plaintiff became the holder for value in the usual course of business.

Pana *vs.* Bowler, 107 U. S., 529.
Harter *vs.* Kernochan, 103 U. S., 562.

This Court has invariably held that where the municipal body is authorized to issue bonds dependent upon the existence of certain facts or the happening of certain things, the existence of which is peculiarly within the knowledge of such body or its authorities, the *bona fide* holder has a right to assume that such things did exist, if the fact be expressly or impliedly so certified on the face of the bonds.

Lynde *vs.* The County, 16 Wall., 6.
Comm's *vs.* January, 94 U. S., 202.
Town of Coloma *vs.* Eaves, 92 U. S., 484.
Comm's *vs.* Bolles, 94 U. S., 104.
County of Warren *vs.* Marcy, 97 U. S., 96.

If bonds are issued with recitals that they are issued under statutory enactments, the municipality, as to a *bona fide* holder, is estopped from showing that it had imposed certain conditions on its liability, although the statute declares that, in such event, the bonds shall not be binding until such conditions were performed.

Insurance Co. *vs.* Bruce, 105 U. S., 328.

A *bona fide* holder of negotiable paper for value before maturity takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker

to issue it, or unless its circulation is by law prohibited by reason of the illegality of the consideration.

Cromwell *vs.* County of Sac, 96 U. S., 51.

The true rule is this, that the holder of a negotiable bond for value is entitled to the presumption that the officials have discharged their duty, and if prerequisites to its issue existed which are mere questions of fact and peculiarly within the knowledge of the municipal authorities, their recital to that effect is conclusive against the maker. Any precedent fact existing *in pais*, liable to be determined differently in suits on the same issue of bonds, is conclusively settled by the recital that the bonds are issued under laws requiring such conditions.

The cases in this Court which are erroneously supposed to contradict the rulings referred to will be found on examination to involve the issue of bonds wholly without authority and often against the positive enactments of law.

Such is the case of Anthony *vs.* Jasper Co. (101 U. S., 693), where the bond was issued without registration, the law declaring that such a bond "shall not be negotiated nor have validity."

The same is true of Dixon Co. *vs.* Field (111 U. S., 83), where the constitution of Nebraska absolutely prohibited the issue of bonds except upon conditions which were violated in their issue.

And so in Buchanan *vs.* Litchfield (102 U. S., 278), it was said: "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873."

And in the same manner, in National Bank *vs.* Porter Twp. (110 U. S., 608), it was not allowed the trustees to conclude by recital the fact that the contingency had arisen giv-

ing them the power to issue bonds, that contingency being one which, if existing, must be a matter of record.

But in Marcy *vs.* Twp. of Oswego (92 U. S., 637), in Wilson *vs.* Salamanca (99 U. S., 499), and other like cases, where a computation of the amount of property in the township in order to pay interest was involved; and in Town of Venice *vs.* Murdock and others, where was involved the question whether two-thirds of the tax-payers had previously filed a written application in court asking the issue; or, in Sherman County *vs.* Simons (109 U. S., 735), whether an indebtedness already existed beyond which the commissioners could not go—are questions to be considered and determined by those who were authorized to issue the bonds.

Hence I conclude that the question of population of the town (no rule having been fixed for its determination which could bring definite knowledge of the fact to the purchaser of the bond), the question of the election, and the consent of three-fourths of the voters of the town, and also that of the existence of outstanding liabilities against the town for which the issue was made, are all fully settled and concluded by the recitals.

As Judge Dillon expresses the doctrine in his work on Municipal Bonds (page 50), the decision of the authorities "stated or implied in the recital is conclusive against the corporate maker when the bonds have found their way into the hands of innocent holders."

Third. The only plausible objection to the bonds consists in their denominations as issued. The language of the statute is as follows:

"The bonds herein provided for *may* be executed of denominations from twenty-five to five hundred dollars, at the discretion of said mayor and city council or mayor and aldermen, and to mature at such times as may be fixed by said mayor, &c., from one to twenty years after date, and bearing interest at eight per cent. per annum, payable semi-annually."

The bonds as issued are in denominations of $1,000 each, and the interest is 7 per cent., payable annually instead of 8 per cent., semi-annually. The argument is that the provisions of the law touching interest and the size of the bonds are mandatory and not directory.

In Township of Rock Creek *vs.* Strong (96 U. S., 271) the objection was urged that the act under which the bonds were issued required that they should be payable in not less than five nor more than thirty years from the date thereof, and as the bonds issued were made payable thirty years and thirty-five days after their date it was urged that they were necessarily void. This Court in sustaining the bonds held "that these provisions (touching time and interest) were obviously directory and not of the essence of the power."

In the case of Commissioners, &c., *vs.* Clark (94 U. S., 278) the same objections as to length of time and rate of interest were made and overruled by this Court.

In the case of Town of East Lincoln *vs.* Davenport (94 U. S., 801) this Court held the following language:

"The case shows that the plaintiff below was the *bona fide* owner of the coupons sued upon. Questions of form merely, or irregularity, or fraud, or misconduct on the part of the agents of the town cannot, therefore, be considered." * * * "There must be authority in the town to issue the bonds by the statutes of the State. If this cannot be found, the holder must fail; if it exists, he is entitled to recover."

The acceptance and holding of a stock certificate, the issue and delivery of bonds therefor, and payment of interest for a time cure defects in all matters of form, and a *bona fide* taker may assume that everything necessary to their validity has been done.

Com'rs of Johnson Co. *vs.* January, 94 U. S., 202.
Com'rs of Douglas Co. *vs.* Bolles, 94 U. S., 104.

In the case of City of Quincy *vs.* Warfield (25 Ill., 317, 1861) the Illinois laws gave the city of Quincy authority to

issue bonds not exceeding $75,000 at any one time, and at an interest not exceeding 8 per cent., payable annually or semi-annually. The bonds issued were to renew other bonds and stipulated to pay 12 per cent. per annum. It was urged that the bonds were void—

1st. Because the city could not renew a matured bond; and,

2d. Because it stipulated for an interest beyond what the law allowed.

The court in its opinion admits the want of express power to renew an old bond, but says *general power* is given to issue bonds up to $75,000 in amount.

The court says: "We are not satisfied that the city could not issue another bond in renewal of it (the old) if not prepared to pay it. Individuals and all corporations so act, and in such a matter a municipal corporation should not be an exception, unless the charter of its powers expressly restrains it, which is not pretended in this case; but it is said the bond is void because it stipulates for a greater rate of interest than 8 per cent. per annum. In the case of Johnson *vs.* Stark County (24 Ill., 75) we recognized the doctrine that in exercising a power all acts performed in excess of or beyond the power delegated must be rejected as unwarranted; but if, after the rejection of such acts, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted shall be upheld, while all beyond the power shall be rejected as an excess of power. Upon this ruling in the case we must decide and do decide that the bond is valid and binding on the city, with interest, to be calculated at 8 per cent. per annum. It is not vitiated by the excess, but only *pro tanto*, and the court trying the case should have made the deduction," &c.

It was in this case objected that before the bond could be issued its issue must be recommended by the finance com-

mittee. The court holds that the issue of the bond presumes the recommendation.

Johnson *vs.* Stark County, 24 Ill., 75 (1860).

Under the laws of Illinois, where the bonds of Stark county were issued, the principal and interest could only be paid at the county treasury.

The bonds were made payable at the county treasury and the coupons in New York. In a suit on the coupons the court held that acts performed in excess of the power must be rejected, but the remainder will be sustained. The court held that the coupons, though nominally payable in New York, should be paid at the county treasury.

In this case originally one bond for the whole subscription of $50,000 was executed, and afterwards it was returned and canceled and fifty other bonds of $1,000 each, were issued in lieu thereof without any new order of the county court: *Held*, That the county officials, by holding the old, canceled bond, acknowledge the legality of the issue of the new bonds. After enumerating the facts of estoppel the court says: "It is impossible to believe that the board of supervisors were not fully apprised of the mode in which they were issued and intentionally regarded them as legally issued and binding when they performed these several acts. These acts unexplained are as satisfactory evidence of a design to ratify the issue of these bonds as if it had been done by an order of the board of supervisors."

The supreme court of Tennessee has itself sanctioned this doctrine in express terms.

In Clay *vs.* Justices of Hawkins Co. (5 Lea, 141, 1880): *Held*, "It is well settled that where power to issue bonds exists they are not void, although errors and irregularities may have supervened in the exercise of that power. The change of the terms of payment has been too long acquiesced in to be now corrected, and the court having the power to issue the bonds, they are valid."

In the case of Meyer *vs.* Muscatine (1 Wall., 384) the bonds issued were to pay for a railroad subscription, when the only power to issue bonds resided in the following words of the charter enumerating the legislative powers of the city council, to wit:

"To borrow money for any object in its discretion, if, at a regularly notified meeting under a notice stating distinctly the nature and object of the loan and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan by a majority of two-thirds," &c.

A section of an act "regulating interest on city and county bonds" provided "that whenever any company shall have received or may hereafter receive the bonds of any city or county upon subscription of stock by such city or county, such bonds may have interest at any rate not exceeding ten per cent.," &c.

The vote of the people was to borrow money on bonds to run not exceeding twenty years and at a rate of interest not exceeding ten per cent., to be subscribed on stock, &c.

The bonds and coupons as issued were made payable in New York instead of the county treasury, and the interest, at ten per cent., made payable *semi-annually* instead of annually.

This Court held that the bonds were properly issued; that the holder was not bound to know for what purpose the bonds were issued. If the power existed for any purpose the bond was good. The clause in the bond in regard to *semi-annual* interest was held not to vitiate it. This Court said:

"The citizens voted and the city authorities issued the bonds. No one interposed to prevent their issue. It is not questioned that all parties acted in good faith, and the city cannot now be heard to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive he had a right to presume that those empowered to act and acting under it had complied with its requirements."

In Flagg *vs.* Palmyra (33 Mo., 440) it was held that "when a county, acting under an authority it supposed to be valid, subscribed to the stock of a company in good faith, issued its coupon notes in payment of such subscription, and for a series of years voted the stock and paid its coupons, and such notes passed into the hands of innocent and *bona fide* purchasers, it was estopped from asserting that such notes were illegally issued."

In Supervisors *vs.* Galbraith (99 U. S., 214) the bonds as issued were made payable directly to the railroad company, when the law required they should be payable to the "president and directors" of the company: *Held* by this Court, That the provision was merely directory and the irregularity was cured by the recitals.

I have not overlooked the case of Tax-payers of Milan *vs.* Tennessee Railroad Co. (11 Lea, 329), decided in 1883.

The bonds here were issued under a special act authorizing certain counties to subscribe to said company and issue their bonds in payment, the bonds to be of $1,000 each, at 30 years, bearing 6 per cent. interest, payable semi-annually.

The authority, if any, given to the town of Milan and others was "to make subscriptions to the stock of the Tennessee Railroad Company and to lay and collect taxes within their respective corporations to pay the interest on the bonds that may be issued and to create a sinking fund," &c.

The Court in construing this act, says it certainly gives power to subscribe stock, "but it does not provide for the issuance of bonds." The Court says the want of power "is conclusive of the case" and "makes it unnecessary to consider others which are subordinate."

It is true that the Court *obiter* says that it would not order the issue of $100 bonds at 8 per cent. interest when, if any power existed, it was to issue not less than $1,000 bonds and at only 6 per cent.

The Court, however, in this case, refused to order the bonds returned until the holders were refunded the money advanced by them to the town.

This was a proceeding to cancel bonds between original parties, and did not involve rights of an innocent purchaser.

In Ross *vs.* Anderson County (8 Bax., 249), decided in 1874, the Legislature of Tennessee authorized a subscription of bonds, payable in thirty years, and the submission to the people was for a subscription payable in six installments. The vote was favorable, and instead of six-year bonds, as voted, the county court issued bonds payable in thirty years. The supreme court of that State held that the bonds as issued were valid and binding against the county.

V.

But suppose that, in the judgment of this Court, no express power was conferred by the act of 1872 to issue the bonds, yet I insist that if such power was, at the time, assumed to exist and acted upon by the parties to the contract, that the people of the town acquiesced in the issue of the bonds and took no action to prevent their negotiation into the hands of innocent holders, but that, on the contrary, the court of chancery of Tennessee, having jurisdiction of the persons and subject-matter involved, made and entered on its records a decree adjudging the validity of the bonds in the precise form as issued, and that the present holder purchased them for value thereafter, they will not be declared void by this Court.

Lord Ellenborrough properly said: "It is often more important to have the rules of property settled than to determine what they shall be." Lord Mansfield said: "Where solemn determinations, acquiesced in, have settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed as if they had been originally a part of the text of the statute."

Judge Cooley, in his work on Constitutional Limitations, says:

"Before the courts disregard a former decision, however unfounded in law, unreasonable in its deductions, or even mischievous in its consequences, they should consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it and vested rights will be disturbed by any change." (Page 52.)

Chancellor Kent said:

"It is by the notoriety and stability of such rules that people in general can venture to buy and trust and to deal with each other."

First. The supreme court of Tennessee has never passed upon the meaning or construction of the act of March 18, 1872. While I admit that, in several cases, that court denied the authority of municipalities to issue negotiable bonds under the code provisions of 1852, yet in several other cases it substantially maintained such authority.

In the case of Adams *vs.* Memphis and Little Rock R. R. Co. and others (1866) the corporate authorities of Memphis, by ordinance in 1857, appropriated its navy yard (75 acres) to the construction of said railroad, and, in pursuance of said ordinance, conveyed the land to trustees in a deed, wherein the city agreed to pay the principal and interest of $300,000 of railroad bonds to be issued by said company. The bonds were issued and endorsed by the trustees of the city. The city neglected to pay interest, and the holders of the coupons brought their suit to enforce payment and to subject the trust property.

The supreme court of Tennessee said: "Admitting the power under which the mayor and aldermen acted was doubtful (which we are not prepared to concede), and that there were irregularities in the execution of the mortgage, the law seems to be well settled that it does not at this late day lie in the mouth of the city authorities to repudiate their own acts;" and, further, "Now, can the city take advantage

of its direct want of authority in its charter, if such was the case, or its own irregularities in executing the mortgage or endorsing the bonds? We think not. They must be held by their own acts."

The court expressly held that the contract of the city was for legitimate "corporate purposes," and that it was bound to pay the bonds and coupons.

In Adams *vs.* M. & L. Co. (2d Coldwell, 645): *Held*, "That there is an implied power to borrow money for corporate purposes belonging to municipal corporations, and the settled doctrine in Tennessee is that railroad building is a corporate purpose."

In the case of Louisville & N. R. R. Co. *vs.* State of Tennessee (8 Heiskell, 780) the court says:

"We have recently had occasion to say, in a case where the bondholders were themselves parties to the litigation, that after the solemn obligations of the county have been negotiated and thrown upon the commerce of the country, into the hands of *bona fide* holders, who, so far from having notice of any supposed illegality, were encouraged by the county itself through a series of years to give them implicit credit, it would require a very grave departure from legislative restrictions to justify the courts in exonerating the county."

In McCallie *vs.* Chattanooga (3 Head, 317) the authorities of each corporation are left to determine what are "corporate purposes," and in all cases the building of railroads is adjudged to be within the corporate powers of municipalities.

In Seybert *vs.* City of Pittsburgh (decided by this Court, 1 Wall., 272) the Legislature of Pennsylvania incorporating a railroad company had given power to any incorporated city to subscribe to the stock "as fully as any individual," but no express power was given to issue bonds in payment. In a suit on the bonds in the circuit court of the United States a judgment *pro forma* was entered against the bondholder and a writ of error brought here. Before a hearing

in this Court, the supreme court of Pennsylvania, in a case involving the same issue of bonds, had held that "the power to subscribe given to the corporation was a power to create a debt, and consequently to give an evidence of the debt. The authority given was to subscribe as fully as an individual, and as an individual (by agreement with the company) could have given his bond, the city corporation had the same power; that grants of power to corporations are strictly construed in favor of the public, but it would be a perversion of the rule to permit a corporation to use it to defraud creditors or to protect itself against its own assumed obligations. If they legally owe a debt they can give a bond for it."

This Court, by Justice Greer, announced its concurrence with the opinion of the Pennsylvania court and ordered judgment for the holder of the bonds on the special verdict.

See p. 274.

Mr. Daniel, in his work on "Negotiable Securities," considers the American rule to be that a municipal corporation has implied power to contract a debt whenever necessary to carry out any power conferred upon it; that whenever it may contract a debt it may borrow money to pay it, and that whenever it may contract a debt or borrow money it may issue its negotiable bonds in payment.

In Nichol *vs.* Mayor of Nashville (9 Humph., 250) the supreme court of Tennessee says: "The power to contract necessarily implies the power to execute the commercial evidences thereof."

Second. Whether the bonds as issued by the town in 1873 were authorized by express law or not, the question of validity was at least of such uncertainty as to create a good consideration for any compromise adjustment respecting them. The record shows that the town authorities went into the chancery courts of the State alleging the invalidity of the

bonds, and, being confronted by this uncertainty, made an agreement by which they obtained a new consideration therefor, *to wit*, stock in the consolidated road; whereupon they solemnly admitted their liability in the form of the present bond, and caused a decree to that effect to be entered of record, and they still retain the stock of the road, which, for all that appears in the case, is worth more than the bonds themselves.

Under such circumstances it would be clearly inequitable to allow this defense.

In a similar case this Court said:

"Having exchanged the bonds for stock, we think the county cannot retain the proceeds of the exchange and assert against a purchaser of the bonds for value that, though the Legislature empowered it to make them and put them on the market upon certain conditions, they were issued in disregard of the conditions."

It is a universal rule of this Court that "if a contract, when made, was valid under the constitution and laws of a State as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this Court as establishing its invalidity."

Olcutt *vs.* Supervisors, 16 Wall., 678.
See, also, Ohio Life Ins. Co. *vs.* Debolt, 16 How., 416 and 432.
The City *vs.* Lawson, 9 Wall., 477 and 485.
Douglass *vs.* County of Pike, 101 U. S., 677.
Taylor *vs.* Ypsilanti, 105 U. S., 60.
New Buffalo *vs.* Iron County, 105 U. S., 73.

The supreme court of Missouri had previously held certain township bonds of the State void. The Federal court held them valid. They were compromised for new bonds, to be issued under a vote of the people. The auditor of

state refused to register the new bonds, and on *mandamus* to compel the issue the supreme court of Missouri ordered the registry, saying:

"We cannot say that a bond for the payment of money is a nullity and does not create a debt which is ever a subject of compromise while there is a court beyond the control of this court and having jurisdiction in this State of suits on such bonds which holds them valid and renders judgments on them in favor of the holders. 'Giving up a suit or any equivalent proceedings instituted to try a question of which the legal result is doubtful is a good consideration for a promise to pay a sum of money for an abandonment thereof.' [Citing 1 Parsons on Contracts, p. 439.] Abstaining from prosecuting a suit is equally as good a consideration if the threatened suit is to try a question the legal result of which is doubtful."

State *ex rel.* Stamper *vs.* Holliday, 72 Mo.

VI.

The consent decree rendered in the chancery court, as developed by the record, is conclusive upon the rights of the parties.

In Gifford *vs.* Thorn (9 N. J. Eq., 722) it is said:

"The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict."

In Green *vs.* Hamilton (16 Md., 329), held:

"A judgment by default, if regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of recovery in some cases remains to be ascertained by a jury. When determined we are not aware of any rule or principle of law which attributes to such a finding less dignity or efficacy than to a verdict found upon issues."

"In equity, when defendant fails to answer, the bill is taken *pro confesso*, the consequence of which is that every allegation of the bill is considered as confessed."

Att'y Gen. *vs.* Carver, 12 Ired., 235.
Lucket *vs.* White, 10 Gill & J., 489.

At least every distinct and positive allegation.

In Atkins *vs.* Faulkner (11 Iowa, 326), Platt *vs.* Judson (3 Blackf., 235), Brown *vs.* Mayor (66 N. Y., 390), held:

"When a matter in controversy between parties has been submitted to a competent judicial tribunal its decision thereon is final between the parties until it has been reversed, set aside, or vacated, and the rule of *res adjudicata* applies not only to judgments rendered after litigation of the matter in controversy, but to judgments rendered upon default or confession."

To same effect—

Jarvis *vs.* Driggs, 69 N. Y., 143.
Newton *vs.* Hook, 48 N. Y., 676.
Gates *vs.* Preston, 41 N. Y., 113.
White *vs.* Merritt, 3 Seld., 355.
Cromwell *vs.* Sac Co., 94 U. S., 356, 357.

In Tadlock *vs.* Eccles (20 Tex., 791) the court says:

"There are other rights secured by the Constitution which are equally sacred and inviolable. The right of personal liberty and the right of personal security are not less so, yet these and every other right which is secured by the Constitution and laws may be divested by the judgment of a court of competent jurisdiction."

See also—

Miller *vs.* Sherry, 2 Wall., 237.
Lee *vs.* Kingbury, 13 Tex., 70.
Larson *vs.* Reynolds, 13 Iowa, 582.
Wilson *vs.* Stripe, 4 Greene (Iowa), 551.

In Corpening *vs.* Kincaid (82 N. C., 202) Dillard, J., said:

"It is an elementary principle, needing no citation of authority, that the judgment of a court of competent jurisdiction is conclusive as to everything passed upon and adjudged therein, and gives the right to have process to execute the same. * * * To allow the defendant now to claim his homestead in the lands which were adjudged to be affected by a specific lien anterior to the adoption of the constitution giving the exemptions, is collaterally to impeach the judgment of the court ordering the sale of the lands."

"Where a suit is dismissed by agreement it amounts to an open and voluntary renunciation of the matter in suit and bars subsequent action thereon."

Hood *vs.* Raymond, 42 Cal., 643.
Freeman on Judg., sec. 262.

"The settled policy of the law will not permit a matter once adjudicated to be drawn in question again between the parties while the original judgment remains in force."

Wells' Res Adjudicata, sec. 443.
Hillsboro *vs.* Nichols, 46 N. H., 384.

A consent decree bars any other suit between the parties on the cause of action stated.

3 Dana, 395.
10 B. Munroe, 257.
12 B. Munroe, 427.

The Tennessee decisions are equally strong on the subject of consent decrees.

Dillard *vs.* Harris, 2 Tenn. Ch., 193.
Mayo *vs.* Harding, 3 Tenn. Ch., 237.
Greenlaw *vs.* Kernshaw, 4 Sneed, 371.
Winchester *vs.* Winchester, 1 Head., 500.
Hoffer *vs.* Fisher, 2 Head., 253.
McGovach *vs.* Bell, 3 Cold., 518.
Kendall *vs.* Titus, 9 Heisk., 738.
Jones *vs.* Williamson, 5 Cold., 371.
Williams *vs.* Nail, 4 Heisk., 279.

And this Court, in United States *vs.* Parker (120 U. S., 89), said :

"It has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to be such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action."

Bank *vs.* Hopkins, 2 Dana, 395.
Merritt *vs.* Campbell, 47 Cal., 542.

"It is clearly so when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties."

To the same effect is the New Orleans compromise case (109 U. S., 221).

VII.

The grounds on which the lower court proceeded to avoid the bonds in controversy are not sustained, either by the adjudications of this Court or by those of the Tennessee courts.

The circumstances connected with their issue show beyond question that all parties at the time assumed that the bonds were issued under the act of March 18, 1872, and that the authority for that purpose was ample and complete. Nobody can deny as against an innocent purchaser the validity of the subscription. Nobody can deny that the town authorities had power on the day after the subscription "to anticipate the collection of the railroad tax by the issuance of warrants bearing six per cent. interest," and to instantly deliver the warrants to the company in payment for stock. Nobody can deny, against the admission in the

record, that the railroad was completed in 1873; and no one can well controvert the reasonable presumption that the subscription had been collected by the company, and at the date of the bonds constituted a "liability" or a "claim" against the town. No one can deny, either against the admission in the record or against the minutes of the town authorities, that for the issue of the bonds and previous to their issue more than "three-fourths of the qualified voters, voting at an election held for that purpose, under the supervision of the mayor and board of aldermen, voted for the bonds, or that the votes were duly canvassed and the result entered on the town records.

No one can deny that in the bill afterwards filed in the chancery court by the mayor and aldermen of the town "in their official capacities" as such, they solemnly admit that the bonds were issued under the act of 1872 by alleging that at the time of the issue the town contained less than one thousand inhabitants. No one can deny that in said bill the town again solemnly admits that the bonds would be valid in the hands of an innocent purchaser, and that in such event the town "would be bound to pay the same;" and no one will deny that in the administration of justice in this Court the rights and obligations of parties will be measured by the same standard which they themselves used when the contract was made.

19 Wall., 666.
105 U. S., 60.
105 U. S., 73.

No Tennessee court has ever yet intimated that these or similar bonds are void. On the contrary, a court of the highest character in that State, after hearing every possible objection to their issue, gave them the stamp of authority by an unreversed decree, on the faith of which my clients gave their money. It is not denied that the town authorities received the stock which was purchased with this money and

now propose, in the full enjoyment of the railroad itself, to hold the stock and repudiate the bonds which they gave as the only consideration.

If when ~~lands~~ bonds are put on the market there has been no authoritative decision against them; if there has been general acquiescence, and no department of the State government has lifted its voice to declare their invalidity, this Court will not hasten, as against an innocent purchaser, to overthrow a policy which, instead of being questioned in the State tribunals, has received their positive sanction judicial without protest from any other department of the State government.

19 Wall., 666.
1 Dillon, 261.
101 U. S., 697.

It cannot, consistently with adjudicated cases, be denied that, where conditions are imposed by law on the issue of bonds, the *bona fide* holder for value has a right to assume that they have been complied with. If the law had declared that before a bond should be valid the population must affirmatively appear by some fixed rule, as by the last Federal or State census, the purchaser is plainly directed to one of the sources of power; but in this case it is clearly submitted, along with the question of popular consent and the present liability of the town, to the judgment and decision of the mayor and aldermen of the town—the authorities to whom is given the administration of its corporate powers.

These questions are all foreclosed by recitals and by the decree in the Tennessee court, and nothing is left for the trial court or for this Court but to apply to the performance of this contract the same rules which governed the parties in making it.

J. B. HENDERSON,
For Plaintiff in Error.
With HOLMES CUMMINS.

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THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

NO. 206.

Kelly & Alexander, Plaintiffs in Error,

VERSUS

THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN,

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

SPARREL HILL, ATTORNEY.

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VERSUS

THE MAYOR AND ALDERMEN OF THE TOWN OF MILAN,

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SPARREL HILL, ATTORNEY.

The defendants in error insist that bonds and coupons sued upon in this cause *were issued without authority of law, and are void.*

These bonds and coupons were issued in payment of a stock subscription pretended to be made by the defendants in error to the Mississippi Central Railroad Company, and are made payable to said company twenty years after their date—"first day of July 1873"—and bear *seven per cent.* interest, and on their face recite as the consideration of their issuance the "location of the Mississippi Central Railroad by said town."

Hence every bond carries *notice* upon its face to every purchaser of the *consideration and purpose for which it was issued.*

It is now too well settled by the decisions of this Court and of the Supreme Court of Tennessee to be debated, or to require a citation of authority, that municipal corporations have no *implied* powers to *become stockholders* in railroad companies or other like enterprises, but that this power must be expressly conferred by legislative grant. And it is equally well settled that the power to subscribe for stock does not carry with it the power to issue negotiable bonds in payment of its stock subscription. (Tax-payers of Milan v. Tennessee Central Railroad Company, 11 Lea, 330; Green v. Town of Dyersburg, 2 Flippin, 477, 625; 45 Barbour, 208; Marsh v. Foulton County, 10 Wallace, 676; Mayor & Alderman of Pulaski v. Gilmore, page 27, brief of Plaintiff in Error; Wills v. Supervisors, 102 U. S., 625; Claiborne County v. Brooks 111, U. S., 400; and other authorities cited in the able opinion of the trial judge, copied into the record of this case.)

It will not be denied but that such powers are foreign in fact to the purposes and objects for which municipal corporations are created, and it will not be denied but that whenever and wherever this power has been vested in municipal corporations, it has generally proven disastrous to the municipalities and ruinous to the tax-payers. Municipal corporations are created for a simple local government.

As said by the Supreme Court of the United States in the case of Mayor v. Ray, 19 Wallace, 475–6:

"A municipal corporation is a subordinate branch of the domestic government of the State. It is instituted for

public purposes only, and has none of the peculiar qualities and characteristics of a *trading corporation.*

"Its objects, responsibilities, and powers are different. It is simply a local governmental institution, existing for the benefit of the people within its corporate limits.

"Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the *creation of specific means excludes others.*

"Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditor.

"But they must look to and rely *on the legitimate mode of raising funds for its payment. That mode is taxation.*

"If the power to borrow money, or issue bonds or other commercial securities, is needed, it must be expressly granted by the Legislature.

"It is too dangerous a power to be exercised indiscriminately by municipal bodies, managed as they are by persons whose individual responsibility is not at stake."

With much more force do these remarks apply when it is sought to invest the municipality with powers wholly foreign to the purposes of their creation—such as becoming stockholders in railroad companies or other private enterprises, and issuing its negotiable bonds in payment of its stock subscription.

A municipality, like other corporations, is an ideal thing—an abstract entity; it acts only through its officers and agents, and its charter is the letter of attorney to its agents or officers.

Whatever power the agents or officers undertake to exercise in the name of the corporation, no matter how germain to the purposes of its creation, they must be able to put their finger upon the power in their letter of attorney —the charter.

The ordinary rules and principles of the laws of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body, of which they are but public agents.

The officers or agents of a municipal body are only clothed with naked powers, and even when the powers they undertake to exercise are germain to the purposes of the local government, they are strictly construed, and every doubt as to the existence of the power is by the courts resolved against the corporation and the power denied. (See 1 Dillon on Municipal Cor., 3d ed., Sec. 89.)

And all acts beyond the scope of the power granted are void. (See 1 Dillon on Municipal Cor., 3d edition, Section 89.)

The officers of a municipal corporation are not only mere agents, but are *special* agents, possessing only powers *specially* delegated, and like all *special* agencies, every act in excess of the power specially delegated is void. (See 1 Dillon on Municipal Cor., Section 89; see Floyd Acceptances, 7 Wallace, 676; January number Southern Law Review, 1872, page 17; 13 N. Y. 632; 10 Wallace, 676.)

These rules of strict construction apply to the *ordinary* acts of the agents or officers of municipal corporations; and with how much greater force must they be applied when the acts of the agent or officer are foreign to the

purposes for which the municipal government was established? And with still greater force and strictness will these rules be applied to the acts of agents or officers of a municipality pretending to exercise so dangerous a power as making the municipality a partner or stockholder in a railroad company or other private enterprise, and issuing its negotiable bonds, running twenty years to maturity and bearing a heavy rate of interest.

And we submit that, in the face of public and judicial experience with regard to the exercise of these powers, and the baneful consequences that have most generally followed their exercise whenever and wherever granted, that the Courts will be slow to find the existence of any such power, public policy and private interest alike condemning the grant and forbidding its exercise; and those who, at this late day and in the light of the judicial and public history of this power and its exercise in this country, insist upon its existence, must be able to put their finger upon it, showing its clear and unmistakably expressed existence; and those who claim their pound of flesh under its attempted exercise, must show not only an express grant of power, "but must show its *strict and literal pursuance.*" (11 Lea, 329.)

And it will be observed that the grant of power to a municipal corporation or county to *make subscriptions* to the stock of a railroad company is one thing, distinct and separate from the power to *issue negotiable bonds* in payment of the subscription, and the one power is not included in the grant of the other.

The power to become subscribers to the stock of a railroad company must be expressly granted, and the power to issue negotiable bonds in payment of the subscription

is a separate and distinct power, and not included in the power to subscribe.

Where the General Assembly has expressly granted to municipal corporations the power to subscribe for stock in railroad companies, this power must be *strictly* pursued. And where the power to subscribe is granted, without more, the issuance of negotiable bonds in payment of the subscription is *ultra vires*, and *the bonds are void.*

When a municipal corporation is authorized to subscribe for a stock in a railroad company, and becomes a subscriber, the subscription can only be collected in the ordinary way that other debts of the corporation are collected, which is the ordinary mode of taxation; and no power to issue negotiable bonds in payment of the subscription exists without a *special* grant of this *distinct* and special power. (Milan v. Railroad Company, 11 Lea, 329; Pulaski v. Gilmore, Appendix to Brief of Plaintiffs in Error; Mayor v. Ray, 19 Wallace, 468; Mills v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S., 400.)

II.

In every instance in Tennessee where the power to subscribe for stock in railroad companies by counties and municipalities has been granted, the mode or manner of paying the subscription has been specifically pointed out. So universal has been this legislative habit, that no case can be found where this power has been conferred without other provisions pointing out the manner in which the subscription is to be met.

When the manner of providing for or paying the subscription is pointed out in the statute, of course there is

no room for implication of other powers. The universal practice in Tennessee, where it was desired to confer upon counties or municipalities the power to issue negotiable bonds in payment of ~~the subscription to the capital~~ stock subscription, has been to procure an enabling act from the legislature expressly authorizing the issuance of the bonds. And in no instance have the bonds issued for this purpose been sustained except upon an express legislative grant.

In exhibit No. 11 to the brief for Plaintiffs in Error in case of Exstein Norton v. Mayor & Alderman of Dyersburg—the case immediately following this—over nineteen instances are cited where the Legislature of Tennessee, after authorizing a subscription for stock, deemed it necessary to add express power to issue bonds.

Doubtless these nineteen instances, upon a more careful examination of the legislation in Tennessee, could be doubled.

The general power to subscribe for stock was conferred upon counties and municipalities of Tennessee by the act of 1852, carried into the Tennessee Code, Sections 1142 to 1161 inclusive. (See Appendix to Brief of Plaintiffs in Error, pages 31, 32, and 33.)

Under this act no authority was given or ever claimed authorizing the issuance of bonds.

The mode and manner of meeting the subscription authorized by the act of 1852 (Code 1142 to 1161) is specifically pointed out in the act itself, and necessarily excludes the power to issue negotiable bonds.

No general act of the Legislature in Tennessee prior to 1887 was ever enacted authorizing counties and municipalities to issue negotiable bonds.

But in every instance, where it was desired to confer this power, it was done by a special act *enabling* the particular county or municipality to issue its bonds in that instance.

And in more than nineteen instances in the legislation of Tennessee have these special enabling acts been passed. If it was supposed the act of 1852 (Code 1141–1162), which did authorize the counties and municipalities to subscribe for stock, carried with it the power to issue negotiable bonds, why the necessity of special enabling acts in every instance where it was desirable to confer this latter power?

It being so thoroughly understood that the power to issue negotiable bonds did not follow, and would not be implied from the power to subscribe for stock without a special act expressly authorizing the issuance of the bonds, the Legislature of Tennessee, in 1887, for the first time in Tennessee, passed a *general* act authorizing any of the counties or municipalities of the State, under certain restrictions set out in the act, to issue negotiable bonds in payment of subscripton to the capital stock of any railroad company.

(See Appendix to Brief.)

If the power to issue negotiable bonds in payment of the stock subscription was to be implied from the simple power to subscribe, there would have been no necessity for the great number of special enabling acts, and no necessity of the act of 1887. So it cannot be denied but that the legislative and judicial determination on this subject has been without exception that the power to issue bonds in payment of stock subscription is not to be implied from the power to subscribe. The two powers are separate and

distinct, and each power must be distinctly and expressly conferred. It's not pretended, in this case, that the municipality of Milan has a special grant of power to either become stockholder in this or any other railroad company, or to issue bonds in payment of its subscription of stock. If any power it had, it derived it from the general legislation of the State, as there is no special legislation on this subject as applicable to Milan alone.

And it is manifest that there is no general law or authority in Tennessee authorizing the issuance of these bonds.

The Supreme Court of Tennessee, in two cases where this direct question was presented, has expressly determined that no such power is conferred by any general law or authority in Tennessee.

(Tax-payers of Milan vs. Railroad, 11 Lea, 330; Gilmore vs. Pulaski, MS. Plaintiffs in Errors' Brief.)

III.

We do not understand the brief of Plaintiffs in Error in this case to distinctly contend that the power to issue bonds is conferred by the act of 1852 (Code 1142 to 1161), but it is contended that the act of 1870–71, passed 16th of January, 1871, does confer express authority to issue bonds.

This act is entiled "An Act to enforce Article II., Section 29, of the Constitution, to authorize the several counties and incoporated towns in this State to impose taxes for county and coporation purposes." This act was before the Supreme Court of Tennessee in the case of Pulaski v.

Gilmore, and the opinion in that case will be found in the appendix to Plaintiffs in Error's Brief.

In that case, the town of Pulaski had subscribed for $40,000 of the capital stock in the Memphis & Knoxville Railroad, and issued its twenty-year bonds in payment. This act of 1871 was relied upon as authority for the issuance of these bonds.

The Court says: "We need scarcely say that, in order to the issuance of such bonds, there must be an express authority given the city or town, either by a general law of the land, or by a special law, for this purpose. * * * The act of January, 1871, was intended to regulate elections under the Constitution. The first section simply embodies the authority contained in the Constitution as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can be possibly construed, on any fair principle of construction, to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company."

This act, as shown by its caption, was intended to enforce Article II., section 29, of the Constitution of 1870. Neither the Constitution nor this act confers any authority to lend credit or subscribe stock, but simply regulate the exercise of the authority if it exists elsewhere. As stated by the trial judge, "the only effect of this act, or the constitutional provision referred to in it, on the general law—and it so affects all special laws as well—is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors voting at the election in favor of it. In all

other respects, the statutes authorizing subscriptions remain as they were before this act was passed."

The Supreme Court of Tennessee, in the Pulaski case just cited, so construed the act.

It is manifest that this act was not intended to confer any power, but merely intended to provide for the exercise of such powers as already existed.

In the case of Milan v. The Railroad, *supra*, the construction which we insist should be placed upon the act of January 16, 1871, was applied to an act containing provisions much more favorable to the power to issue bonds. The act construed in that case was Chapter 53, of the Acts of 1869-70, Sections 4, 5, and 15, said act being entitled, "An Act to secure the completion of the Tennessee and Pacific Railroad." Section 4 authorized the county of Dyer and other counties to subscribe for stock in said railroad company. Section 5 provided that such subscriptions should be paid in thirty-year bonds. Section 15 provided that the town of Milan, and other towns in said counties mentioned in Section 4, should have the same power and authority to make subscriptions to the stock of said railroad, and to lay and collect taxes to pay the interest on the bonds, as is granted to said counties. It will thus be seen that Section 15 contained express reference to bonds that might be issued for such town subscriptions, while that portion of the act of January 16, 1871, which authorizes counties, cities, and towns to become stockholders in railroad corporations, contains no reference of any kind to bonds. It was insisted that the said Section 15 authorized the towns of Milan and Trenton to issue bonds in payment for their subscriptions to said Tennessee and Pacific Railroad.

Upon this question the court decided as follows: "The next question is, does the 15th Section give a power to issue bonds at all? It certainly gives the same power to make subscriptions as is given in Section 4, but it does not provide for the issuance of bonds, as in Section 5. It makes no provision whatever for the issuance of bonds. All that is said upon the subject of bonds is, 'To lay and collect taxes, within their several corporations, to pay interest on the bonds that may be issued.' Whether the Legislature or the draftsman of the act had the opinion that there already existed a law authorizing the issuance of bonds, or whether it was intended to enact such a law at a subsequent day of the session, we cannot determine. Certain it is that no such then existed, that none such was subsequently made, and none such can be created by any reasonable intendment from the act before us. The construction contended for by the defendants would be to alter the law and terms of the contract, or rather to make a new contract in conformity to law for the parties. As under the law of this State contracts of the character before us can only be made under a legislative authority, and as all persons are presumed to know the law, the holders of the bonds must be holden to have had notice of the want of authority to issue."

IV.

But it is insisted for the Plaintiff in Error that there is an act of the General Assembly which has been disregarded or overlooked by the Supreme Court of Tennessee.

It is hardly probable (to say no more), that there was any act of the General Assembly on this subject overlooked both by the courts and the counsel for the bond-

holders in these cases, where the whole subject was so thoroughly discussed at the bar and reviewed by the courts. It would be indeed most remarkable if such had been the case.

And, in truth, nothing was overlooked. And the act upon which the learned counsel for Plaintiffs relies (the act of March 23, 1872, Chapter 20, found in Acts of the called session of 37th General Assembly, 1872), we respectfully submit has no *application* to this case, or to any case involving the question of power in a municipal corporation to issue its negotiable time bonds in payment of its *stock subscription to any railroad company.*

FIRST. The act of March 23, 1872, only applies to cities or towns that have a population of from one to twenty thousand inhabitants.

And it is admitted by the Plaintiff in this case that in fact the municipality of Milan did not have as many as one thousand inhabitants when the bonds and coupons in this case were issued. And as Milan did not have the requisite population, it follows that no power or authority can be drawn from the act of the 23d of March, 1872.

A city or town with a less population than one thousand derives no power from this act.

The fact that the agents or officers of any city or town of a population of less than one thousand *assume to issue* bonds in the name of a municipality under this act is not conclusive upon the city or town that it had the requisite population. The municipality, as against innocent purchasers, etc., cannot deny the *regularity* of any act of its agents or officers within the *scope* of the agents' or officers' *power* or *authority*. This is not a question of *regularity* of

the *execution* of a *power*, nor of the performance of the conditions precedent to the *execution of a power*, but it involves the question of the *existence* of the *power itself*. If the city or town did not have a population of at least one thousand, it did not derive any power from this act. The Mayor of a town cannot *confer* upon the municipality any power by *assuming* to exercise a *power not conferred by legislative grant*. This is altogether unlike those cases where the power *exists*, and the question is as to its *regular exercise* or as to the *performance* of conditions precedent to its exercise. In those and like cases the *power exists*, and the rights of an innocent holder cannot be affected by the non-performance of some precedent condition by the agents of the municipality, but every holder is bound *to know* that the *power to issue the bonds exists*.

These bonds do not recite that the town had any given number of inhabitants, but only that they were issued "in pursuance of the laws of Tennessee." It is not pretended that the Mayor or other officers or agents of the Defendant in Error was vested by any act, general or special, with power or authority to determine the number of inhabitants. Nor is there one word in this act of 1872 imposing the duty of ascertaining the population on the Board of Mayor and Aldermen of the towns and cities referred to in the act, nor any provisions from which such a duty on their part can be inferred. The "consent of three-fourths of the qualified voters voting at an election held for that purpose under the supervision of said Mayor and Alderman" is provided for, but this does not confer the power to take a census of the inhabitants. There is no general or special act of the Legislature requiring these or any officers of our municipalities, or of the State, to take a census or keep a record of any enumeration of their respective inhabitants.

Generally when our acts refer to population, and direct its ascertainment, they refer in terms to the Federal census as a guide, and we have no law or practice requiring municipalities to discharge this duty.

There was, then, no duty devolved on this board to ascertain or determine the fact of population, and their determination of it cannot be implied from the recitals in the bonds.

It was a matter as much open to the payee of the bonds at the time of the contract, and since to the holders of them, as to others to decide for themselves. Therefore no estoppel can operate against the Defendant in Error on account of the issuance of these bonds.

This estoppel only operates when the duty of ascertaining the FACT has been devolved by law upon the municipality, or other authority which undertakes to determine it by the recital. (Northern National Bank v. Trustees, Porter, 110 U. S., 608.)

SECOND.—And for another reason the act of March 23, 1872, has no application to this case.

The bonds authorized to be issued under this act shall not exceed $15,000, and shall be of denominations of from *twenty-five* to *five hundred* dollars. The bonds in this case are all of denominations of $1,000. This act only authorizes the issuance of bonds of denominations from $25 to $500, and not $1,000.

The power to issue negotiable time bonds by a municipal corporation is a *special power*, and must be strictly pursued and *construed*—nothing is inferred or implied in its favor.

In the language of Judge Turney, in delivering the opinion of the Supreme Court of Tennessee in the case of Tax-payers of Milan *et al.* v. Railroad, 11 Lea, 334:

"If the grantees of a power may, as was done in this case, decrease the denomination of the bond and increase the interest, it for the same reason may do both. If it may change the power given by statute in one essential respect or provision, it may extend the change to another and to another, until it has changed it entirely, and made a new and different one in its stead. It is a rule in this State that power like the one before us, and which can only be derived in the way pointed out by the Constitution and laws of the State, must be *strictly construed and pursued.*"

THIRD.—For still another reason the act of March 23, 1872, has no application to the case at bar. The bonds by this act, in the language of the act itself, "shall *be alone for the* purpose of paying the outstanding *liabilities* against the city or corporation issuing them, and *shall not* in any case exceed the unsettled and *matured liabilities* or debts of such city or corporation at the time of the issuance thereof." The bonds in controversy were, as appears from their face, issued in payment of a subscription to the Mississippi Central Railroad Company. This act of the General Assembly never contemplated the delegation of power to municipal corporations to issue negotiable bonds in payment of such *subscription.* Nothing could be more foreign to the purpose of the act than the grant of any such power as is contended for by the Plaintiff. The purpose of this act, together with a number of other acts of similar character applying to larger cities, is too manifest to admit of controversy or dispute. The *sole purpose* and *scope* of this act, as is clearly *expressed* upon its

face, was to enable certain towns and cities in this State that had become indebted, to fund their *matured* debts by the issuance under this act of twenty-year bonds.

It would not only be a *strained and unnatural construction* to give to this act to hold that it authorized towns and cities to subscribe *or* pay for stock in a railroad company by issuance of bonds, but such construction is expressly forbidden by the act itself. The act provides that the bonds shall alone be issued to pay outstanding liabilities that had already *matured* against the city or corporation, and in no event to issue bonds in excess of the matured outstanding debts.

It is superfluous to argue that this act does not authorize the towns and cities coming under its provisions to subscribe for stock in a railroad company, and issue its bonds in payment thereof. The scope and purpose of the act is so plain that none can doubt its meaning.

In the language of Justice Fields in the case of Marsh v. Fulton County, 10 Wallace, 676, "any purchaser of these bonds, in looking to this act, would see at once that they were not such bonds as were contemplated by the statutes."

We have seen that *all the authorities* agree that all statutes purporting to confer upon municipal corporations the power necessary to issue the bonds like these in controversy in this case, must be *strictly construed and pursued*, and any doubts as to the existence of the power is resolved against the corporation, and the power denied. (Green v. Dyersburg, 2 Flippin, 477; Tax-payers of Milan v. Railroad, 11 Lea, 330; 10 Wallace, 676; 1 Dillon on Municipal Corporations, Section 89.)

No sort of a construction, however loose or liberal, could, by any sort of fairness, ever be given to the act of March 23, 1872, that would uphold or authorize the issuance of the bonds in controversy.

We respectfully submit that there is no pretense of authority to issue the bonds in controversy, and that they are *ultra vires* and void.

V.

But it is insisted that this Court should hold the Defendant in Error as upon non-negotiable bonds or notes, treating the issuance of negotiable bonds as an excess of authority only, and not invalidating the loan with interest as agreed upon.

Ray v. Nashville, 19 Wallace, is cited for this position. That case simply holds that certificates of indebtedness for services rendered, or for property furnished for the use of a city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due the public creditors, are necessary instruments for carrying on the machinery of municipal administration; but it holds further that they are not negotiable, and the doctrine of innocent purchaser has no application to such certificates or drafts.

In Buchanan v. Litchfield, 102 U. S., which was a suit upon bonds, this question was disposed of as follows:

"Whether the city is under a legal obligation to make restitution of the money obtained without authority of law—that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or

officers upon the sale of the bonds—is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds."

In the case at bar the suit is on the bonds. The only question is, are they valid and binding on the defendants?

If Plaintiff in Error has any equities or rights against Defendants in Error, growing out of the original transaction, they cannot be inquired into in this action.

VI.

RES AJUDICATA.

But the Plaintiffs, in reply to the Defendant's plea of "*non est factum*," insist that, notwithstanding the want of power in the Defendant to issue the bonds and coupons in controversy, still it is estopped to deny its power or to question the validity of the bonds, because the question of the Defendant's power, and of the validity of the bonds in controversy, has been settled and *adjudicated* by the Chancery Court at Humboldt, in the case of A. Jordan *et al.* v. Mississippi Central Railroad Company and H. S. McCombs.

This is based upon a decree by *consent* entered of record in the Chancery Court at Humboldt on the 9th day of January, 1875, in the aforesaid cause, then pending in said court, which was a case where the Mayor and Aldermen of the town of Milan, together with certain tax-payers, had filed a bill against the Mississippi Central Railroad Company and H. S. McCombs, the holder of the bonds in controversy in this case, for the purpose of having these bonds delivered up and cancelled as void, etc.

The decree in this case is based upon a written agreement, signed by A. Jordan as Mayor of Milan, and A. M. West as second vice-president of the "New Orleans, St. Louis & Chicago Railroad Company." The agreement is entered of record in said cause, and is *said* to be made the decree of the Court in that cause.

The agreement and decree is in substance that the N. O., St. L. & Chicago Railroad Company shall issue stock in its road to the municipality of Milan to the amount of twelve thousand dollars, and that the twelve one thousand dollar bonds shall have affixed to them the corporate seal of the town of Milan, and shall be delivered to H. S. McCombs, to whom (it is stated) they rightfully belong, and the bonds and coupons are by *consent* to be held as valid and binding upon the corporation of Milan. It will be observed that this is the agreement or contract between A. Jordan, Mayor, etc., as one of the several parties, complainants, and the vice-president of the N. O., St. L. & Chicago Railroad Company, which is no party to either side of the record in said case. That is to say, the N. O., St. L. & Chicago Railroad Company was no party to the record in that case.

The Defendant replies to the Plaintiff's replication of *res adjudicata* in substance:

That the decree relied upon as *res adjudicata* is not binding as such.

1st. Because the Mayor, A. Jordan, who executed the agreement upon which the *consent* decree was based, had *no power or authority* either to *execute the agreement* or *consent to the decree.*

2d. Because the decree (if power had existed to consent to it) was *collusive*, and not the result of *real litiga-*

tion, and that the so-called consent was by an attorney who had *no power to consent*, and who did so without the knowledge or authority of the Defendant in this case, and who, in doing so, did not represent or act for the Defendant, but for the parties opposed to the Defendant in the case, and fraudulently colluded with the opposite interest that the decree might be rendered.

Either of these two propositions is a conclusive answer to the decree.

If it be conceded that the corporation of Milan had no power to issue the bonds in controversy, then they are void, and no act of the municipality, or any of its officers, can render them valid. If the Legislature has withheld from the municipality the power to issue the bonds, the corporation could not acquire the power by any act of its own or its officers. This power can *only be acquired by legislative grant.*

The Mayor had no power to make valid and binding any *ultra vires* act of the municipality.

In the language of the decree, "this suit has been settled by the following agreement," and then sets out the agreement in full. The cause was compromised by the agreement between the Mayor and a party not before the court in that case.

The judgment of the court was never invoked upon any question of law or fact raised in the pleading. The cause was settled and compromised, and the agreement of the Mayor of Milan and the vice-president of the railroad company caused to be spread upon the minutes of the court, and by *their consent* made the decree of the court.

In the language of this Court in the case of Manhattan Insurance Co. v. Broughton, 109 U. S., 125, "a trial upon which nothing was *determined* cannot support a plea of *res adjudicata*, or have any weight as evidence at another trial," and, as decided in Russell v. Place, 94 U. S. 606, if it appears by the record or *aliunde* that the matter was not litigated and decided, there could be no estoppel.

The distinction which must not be overlooked in cases like this, is between the consent to submit *a case* to the court for *its decision*, and a *consent as to what that decision shall be.*

And there is a distinction between that estoppel which the parties put upon themselves by their agreement, which may be pleaded and bind them as an estoppel *in pais*, and that which arises out of the adjudication as an estoppel of records.

The agreement is none the less an estoppel because it takes the form of a judicial decree, but not necessarily does it operate as an estoppel of record.

The pleas respectively setting them up would be essentially different. (2 Daniel Ch. Pr., 5th ed., 659–666.)

In both, the record would be used as evidence; in one case conclusive in its effect to support the plea of *res adjudicata;* in the other, it would not be conclusive, and might be averred against and would be overcome by countervailing proof of sufficient force.

Individuals *sui juris* may agree to almost anything, and bind themselves, but corporations must act within their delegated powers.

It is undoubtedly within their power to compromise litigation, and they may, when sued, consent to orders and decrees, and if the *subject-matter of the suit* be within their authority, it will bind them as individuals.

"A consent decree is the *mere agreement of the parties* under the sanction of the court, and is to be interpreted as an agreement." (Allen v. Richardson, 9 Rich. Eq., 53.)

This was nothing more than an agreement between the parties, and a judgment or decree based upon this agreement cannot have any more or greater binding power or efficacy than the agreement itself.

Whatever decree the court made, or could have made, was based alone upon this agreement and contract between A. Jordan as Mayor, etc., on the one part, and A. M. West as vice-president of the railroad company, on the other part.

If the agreement is void for want of authority or power in the agents of their respective corporations to bind their principals, the decree which rests upon the agreement *alone* for *jurisdiction* is *also necessarily* void.

The court did not assume to pronounce a decree based upon the pleadings and evidence in the cause, but *only upon the agreement* aforesaid, which is made the sole basis of the decree. The court did not assume to exercise any *jurisdiction* other than such as was conferred upon it by the *consent and agreement* of the Mayor of Milan and the vice-president of the railroad company. This decree was no *exercise* or attempt at any exercise by the Chancery Court at Humboldt of its *general jurisdiction*, but only an exercise of jurisdiction or power as derived from the agreement of the parties, upon which alone it is based.

The decree by consent could only operate by way of an estoppel of the parties thereto. If the agreement was executed by agents without the authority of their principals, neither would the agreement or decree based thereon estop the principals.

The decree is based upon the *agreement* and *consent* of the parties thereto, and not upon the *pleadings* or the *record*.

Whatever *jurisdiction* the court undertook to exercise, is derived *alone* from this *agreement* of the *parties*.

If for any cause the agreement is void, the decree, which derives all of its force or effect from the agreement, is necessarily void. The decree is nothing but the *agreement* of the *parties*.

The fact that the *agreement* by the *consent* of the parties *is made* the *decree* of the court, does not add any new force or strength to the agreement. It is still *no more* nor less the agreement of the parties.

If the agreement is void for want of power in the parties who assumed to make it, it is not less void because by the *consent of the same parties it is made* the decree of the court.

Hence, the whole question involved is, did the municipal corporation possess the power to issue the bonds in controversy?

If the municipality did not possess this power, no act of its officers or agents could estop it from setting up, when sued on the bonds, the want of authority as a defense to any recovery thereon.

Where a party cannot bind itself out of court for want of power, it cannot do so by entering the court and consenting to a judgment or decree. The courts have no authority to do the work of the Legislature. They cannot *give* or take any rights or powers on the consent of a party who is without the *power to consent*. Such a decree is clearly wanting in the elements necessary to give it effect as *res adjudicata*. (See Freeman on Judgments, Sec. 250; Wells on Res Adjudicata, Sec. 65; Wharton on Evidence, Sec. 796 and notes; Hicks v. Gossling, 1st Leg. R., 560; 2d Tenn. Ch., 196; 17 P. F. Smith, Pa. St., 436; 12 Heisk., 255; Gay v. Parport, 106 U. S., 698.)

It is further insisted by the Defendant that if the power had existed to consent to such a decree, still this decree would not be *res adjudicata* against this Defendant, because the consent and decree in this case were not the *result* of any *real litigation*, but brought about and procured by imposition, combination, and fraud between the attorney of the defendant and the opposite party, and that it should not be regarded in a court of justice for any purpose whatever.

Such a judgment or decree as this is not binding as an estoppel, and its true nature may be shown by appropriate pleas or replication whenever it is set up as an estoppel. (See 23 Vt., 538; 20 Cal., 441; 12 Howard, 287; 5 Pa. St., 217, 220; 13 Cal., 290; Freeman on Judgments, Sec. 250.)

SPARREL HILL, *Attorney.*

APPENDIX.

CHAPTER 3.

AN ACT to enable counties and incorporated cities and towns to subscribe to the capital stock of any railroad company incorporated under the general laws of this State, in the mode prescribed therein, and to provide for the payment of such subscriptions.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That any county, incorporated city, or town, may become a stockholder in any railroad company incorporated under the general laws of this State, to an amount not exceeding, in the aggregate, one-tenth of its taxable property, by complying with the requirements of this Act.

SEC. 2. *Be it further enacted*, That no county, incorporated city, or town, shall subscribe to the capital stock of any railroad company under this Act, unless its railroad shall run through the county, or within one mile of the incorporated city or town making the subscription; *Provided*, Any county within which the railroad, or any of its branches, terminates may subscribe under the provisions of this Act.

SEC. 3. *Be it further enacted*, That before any county shall make any subscription under the provisions of this Act, the President, or other authorized officer or agent of the railroad company, shall submit to the Chairman or Judge of the County Court, as the case may be, of the county, an application in the name of the company, setting forth the proposed *termini* of its railroad, the amount

of the subscription asked for, the time within which its road will be constructed through the county, and that the application is made under this Act; and the same shall be accompanied by a plan or map, certified by the chief engineer of the company, showing the general direction and line of its railroad in the county. And before any incorporated city or town shall make any subscription under the provisions of this Act, such application must be submitted to its Mayor, or chief executive officer, showing the proposed *termini* of its railroad, accompanied with the declaration on the part of the company, that it will locate and construct its railroad within one mile of such incorporated city or town, within such time as shall be fixed in the application.

SEC. 4. *Be it further enacted*, That upon the presentation of the application, with the accompanying plan or map, as provided in the third section of the Act, it is made the duty of such Chairman or Judge of the County Court, as the case may be, to give ten days' notice to each and every Justice of the Peace of his county to assemble at the Court-house of the county in order to take action on such application. And if at such special meeting of the County Court a majority of the Justices in commission shall be of the opinion that an election should be held in the county to determine whether or not the county should make the subscription applied for, the Court shall so order. And in like manner, upon the presentation of the application to the Mayor or other chief executive officer of any corporated city or town, accompanied with a declaration on the part of the company that its line of railroad shall be located and constructed within one mile of such city or town, as provided in the third section of this Act, then it is made the duty of such Mayor or chief executive officer, to convene the board of Mayor and Aldermen, or other governing or representative

body of such city or town, and submit such application for its consideration; and should a majority of the Board of Mayor and Aldermen, or other governing or representative body of such city or town, be of the opinion that an election should be held in the same to determine whether or not such city or town should make the subscription, it shall so order.

SEC. 5. *Be it further enacted*, That the County Court, or Board of Mayor and Alderman, or other governing body, as the case may be, shall spread upon its records the application and accompanying plan, or map, or declaration, as the case may be, and the amount to be voted upon by the people, and shall have full power to order such elections according to the laws regulating elections in this State.

SEC. 6. *Be it further enacted*, That the election shall be advertised at least thirty days beforehand by notice posted up at the different places of voting, specifying the time it is to be held, for what railroad, and the amount of stock proposed to be taken.

SEC. 7. *Be it further enacted*, That the Sheriff or other officer whose duty it is, or may be, to open and hold elections, shall open and hold an election at every voting place established by law in such county, city, or town, and his certificate of the result of said election to the County Court, or to the proper authorities of such city or town, shall name, in writing, every established voting place at which an election was opened and held, and every one at which an election was not held. And if it shall appear that the election was not opened and held in every voting place, then said election shall be declared null and void, and of no effect, unless it shall be made to appear to the satisfaction of the County Court, or city or town authorities, that said officer, or his deputy, was present at such voting place on the day and hour required by law, and did

endeavor to procure judges and clerks to hold said election, and that he was positively unable to do so, and the election at said precinct could not be held for the want of judges and clerks to hold it.

SEC. 8. *Be it further enacted*, That at the election thus held those voters who are in favor of the subscription shall put upon their tickets the words, "*For Subscription;*" and those opposed, "*No Subscription.*"

SEC. 9. *Be it further enacted*, That it shall be the duty of the County Court, or the Board of Mayor and Aldermen, or other governing body of such city or town, as the case may be, to convene on the call of its presiding officer, for the purpose of acting on the return of the Sheriff, within ten days after such election; and if it shall appear that the same was in all respects fair, and that three-fourths of the votes cast at such election were in favor of subscription, then it shall have full power, and shall proceed to make and execute all necessary orders, and take such action as may be required to make the subscription effective, according to the terms thereof and the provisions of this Act.

SEC. 10. *Be it further enacted*, That should any county, town, or city fail to vote the subscription to any railroad at any election held for the purpose, said county, city or town may at any time, after thirty days, order another election if desired by the railroad company.

SEC. 11. *Be it further enacted*, That such subscription of any county or incorporated city or town shall not become due and payable unless said railroad company shall have constructed and put in operation within the time fixed in the application, and substantially in the direction and on the line as shown in said plan or map, that portion of its railroad located within the county making the subscription, or that portion of its railroad located within the county in which is situated the incorporated city or town

making the subscription, as the case may be; *Provided*, That any county, incorporated city or town making a subscription under the provisions of this Act, may, in addition to the restrictions imposed by this section, stipulate with the railroad company that its subscription shall not become due and payable until the company shall construct its road to such points, or for such distances as may be agreed upon.

SEC. 12. *Be it further enacted*, That when such subscription shall become due and payable, as provided in Section 11 of this Act, the county, or city or town making the subscription shall make and execute its coupon bonds for the amount of such subscription, payable not more than twenty years after date, and bearing interest at such rate as may be agreed upon, not exceeding six per cent. per annum, payable semi-annually, and deliver the same to the railroad company: *Provided*, That such county, city, or town may pay such subscription in cash at maturity, if it shall so elect.

SEC. 13. *Be it further enacted*, That when the subscription so made becomes due, as provided in Section 11 of this Act, it is made the duty of the County Court, or corporate authorities, as the case may be, on the receipt of the certificates of stock, as hereinafter provided, to levy, from time to time, such taxes upon the taxable property, privileges, and persons liable by law to taxation within the county or corporate limits, as the case may be, as will be sufficient and necessary to meet the maturing interest on the bonds of such county, town, or city, and to provide for the payment of the principal; *Provided*, That no tax to pay such subscription exceeding twenty-five per cent. of the amount subscribed shall be levied in any one year.

SEC. 14. *Be it further enacted*, That the taxes prescribed in Section 13 of this act shall be levied and collected as

other county, town, or corporation taxes, and paid into the treasury of the county, city, or town, as other taxes.

SEC. 15. *Be it further enacted*, That the railroad company shall, when the subscription becomes due and payable, as prescribed in Section 11 of this Act, make out and deliver to the county, city, or town, as the case may be, certificates of its capital stock amounting to the subscription, and said certificates shall be held, owned, and voted by such county, city, or town as by other stockholders, and the said certificates of stock, and dividends and profits thereon, and the public benefits derived from the construction and operation of the railroad, shall be in full consideration of such subscription and the benefits derived therefrom by the railroad company.

SEC. 16. *Be it further enacted*, That nothing in this Act is intended, or shall prevent, any county, incorporated city or town from subscribing to the capital stock of railroad companies in the mode heretofore provided by law, the object of this Act being to provide an additional method or plan by which such subscriptions may be made without repealing existing laws.

SEC. 17. *Be it further enacted*, That this act shall take effect from and after its passage, the public welfare requiring it.

Passed February 11th, 1887.

Z. W. EWING,
Speaker of the Senate.

W. L. CLAPP,
Speaker of the House of Representatives.

Approved February 17th, 1887.

ROBERT L. TAYLOR,
Governor.

127-159

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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 206.

KELLY & ALEXANDER

vs.

MAYOR AND ALDERMEN OF MILAN.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

The purposes for which these bonds were issued are stated on the face of the bonds themselves and admitted in the record to be in payment of a stock subscription to the Mississippi Central Railroad Company, and it is admitted that the authority to issue the bonds and to make the *subscription* was one *proposition*, submitted ~~and held~~ at one and the same time.

That is to say, the same vote which authorized the subscription authorized the issuance of the bonds. (Record, pages 11–25.)

Therefore, the bonds were in no sense issued in payment of a *matured liability*, as contemplated by the act of March 18, 1872. The single purpose of this act was to enable towns *already indebted* to fund their *past-due* indebtedness and not to authorize the *creation* of a *new debt*.

There could be no submission of the question to the people whether they would by a vote authorize the issuance of bonds in payment of *a matured liability* until after the creation of *the liability* and *its maturity.*

There was no *authority or power* in any one to submit the proposition to issue bonds under this act until after the maturity of a liability previously created.

The question of power is always an *open one.*

The question is not whether the election was regular, &c., but whether the municipal officers had *the power* to hold any *election at all.*

Under the act of 18th March, 1872, the only power there granted was to hold an election, *not to create a new liability,* but to authorize the municipal authorities by a vote of the people to fund into twenty-year eight per cent. bonds of denominations of not less than $25.00 nor more than $500.00, *a previously created and already matured liability.* No power is given under this act to hold an election to ascertain the will of the voters on the subject of creating a *new liability,* but only to ascertain their will on the subject of funding into twenty-year bonds a previously created and *already matured liability.*

If these bonds did not (which they do) carry notice on their face of the purpose for which they were issued, still the "purchaser is charged with notice of the laws of the State *granting power* to make the bonds they find on the market."

Norton Bank *vs.* Potts, 110 U. S., 618.
Dixon County *vs.* Field, 111 U. S., 83.

In these cases last cited the distinction between the *power*

to hold an election at all and the regularity of an *election authorized* is clearly stated.

No recital in the bonds could create a *power* not before existing. The recitals in any bond only operate as an estoppel because of the existence of the power to make the recitals.

The *power to issue the bonds* does not depend upon the recitals, but upon the statute.

The recital of power does not confer power. The recitals in bonds are only binding when the recitals are made by some agency specially authorized to make *the recitals* and to make them conclusive.

Dixon County *vs.* Fields, 111 U. S., 84.
Bank *vs.* Potts, 110 U. S., 618.

In the case at bar the bonds upon their face recite that they were issued in "consideration of the location of the Mississippi Central railroad by said town," and not for the purposes of funding a past-matured indebtedness, as authorized under the act of March, 1872.

No one could be misled by the face of these bonds and the act of 1872.

The act of 1872 authorized bonds to be issued signed by the mayor and countersigned by the recorder; the bonds here are *only* signed *by the mayor*, and not by the recorder. The act of 1872 authorized bonds of denominations of from $25 to $500; the bonds here are all of denominations of $1,000. The act of 1872 authorized bonds bearing eight per cent. interest, payable semi-annually; the bonds here bear seven per cent., payable annually. The act of 1872 authorized, as before stated, bonds to be issued ONLY in